Available Terms and Conditions, proposed as a trigger by USTA, does not by itself indicate that new market entrants have made sufficient sunk investments in facilities to resist exclusionary pricing behavior.[245] Finally, although a transport and termination agreement between an incumbent and a competitor may imply that the competitor is carrying traffic over its own network, that may not provide evidence of investment in facilities used to compete with an incumbent LEC. For example, the competitor may carry wireless traffic, which may or may not be a competitive substitute for wireline connections, or the competitor may provide service over UNEs. Accordingly, we conclude that collocation arrangements are more likely than transport and termination agreements to demonstrate that competitors have invested in facilities sufficiently to resist exclusionary pricing behavior.

89. We also reject CFA's proposal to grant pricing flexibility only upon a showing of compliance with the section 271 criteria, among other things.[246] Section 271 compliance demonstrates that a BOC has opened its local markets to competition, but it may not show the extent of competitive alternatives in the market for interstate access services. Competition may have developed to such a degree as to warrant granting pricing flexibility to such a BOC in part of a state, even if the incumbent has not satisfied the checklist, either because it is not interested in section 271 relief, or because, for example, it is working to bring its operations support systems (OSS) into compliance. Delaying pricing flexibility under these circumstances denies access customers the benefits of increased efficiency in the interstate access market. Furthermore, we determine above not to grant pricing flexibility on a state-by-state basis because competitors generally do not enter new markets on that basis. Because section 271 requires the Commission to make state-wide determinations,[247] granting pricing flexibility upon compliance with the 14-point checklist raises the same concerns.

90. Furthermore, we will not require incumbent LECs to demonstrate that they no longer possess market power in the provision of any access services to receive pricing flexibility, for two reasons. First, as we explain in more detail below,[248] regulation imposes costs on carriers and the public, and the costs of delaying regulatory relief outweigh any costs associated with granting that relief before competitive alternatives have developed to the point that the incumbent lacks market power. Second, non-dominance showings are neither administratively simple nor easily verifiable. As several BOCs note in their forbearance petitions, the Commission previously has based non-dominance findings on several complex

[245] USTA Oct. 26 Comments, Att. E.

[246] Specifically, CFA would require "full and sustained compliance" with sections 251, 252, 253, 271, and 272 of the Act. CFA Nov. 9 Reply at 8.

[247] Section 271 requires, among other things, a BOC to satisfy the 14-point checklist throughout a state to obtain authority to offer in-region, interLATA services in that state. *See* 47 U.S.C. § 271(b)(1).

[248] *See* Section VI.C.5.a, *infra*.

criteria, including market share and supply elasticity.[249] Market share analyses require considerable time and expense, and they generate considerable controversy that is difficult to resolve. For example, in response to U S West's Phoenix forbearance petition, several commenters assert that U S West overstates its market share losses by treating re-sold services as services provided by competitors, even though U S West continues to provide the underlying facilities.[250] Sprint claims that we cannot rely on U S West's market share analysis without reviewing the underlying data.[251] Measuring supply elasticity also can be controversial; a number of commenters claim, for example, that U S West underestimates its competitors' costs of extending their networks.[252] ALTS argues, moreover, that excess capacity in competitors' networks is generally limited to particular routes, and incumbent LECs should not, therefore, rely on that existing excess capacity to support claims regarding the elasticity of supply in the interstate access market.[253]

91. We do not address in this Order whether any BOC has adequately supported its market share or supply elasticity claims in its forbearance petition. Rather, we conclude here that it would be administratively burdensome to require incumbent LECs to perform and the Commission to evaluate market share or supply elasticity analyses before the LECs may obtain any regulatory relief, and so we decline to adopt such a requirement here.

92. Finally, we disagree with commenters opposing any additional pricing flexibility for price cap LECs at this time. These commenters either argue generally that price cap LECs have sufficient pricing flexibility to respond to competition under the current price cap rules,[254] or that price cap LECs must not face meaningful competition because rates in the

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[249] *See, e.g.*, Comsat Corporation, Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, 14118-19 (1998), *cited in* U S West Phoenix Forbearance Petition at 14; U S West Seattle Forbearance Petition at 14-32; Ameritech Forbearance Petition at 11.

[250] *See* CompTel Comments in U S West Phoenix Forbearance Proceeding at 3-4; MCI Comments in U S West Phoenix Forbearance Proceeding at 19; Sprint Comments in U S West Phoenix Forbearance Proceeding at 5-7; AT&T Comments in U S West Phoenix Forbearance Proceeding at 8; GST Comments in U S West Phoenix Forbearance Proceeding at 13-16; Qwest Comments in U S West Phoenix Forbearance Proceeding at 6.

[251] Sprint Opposition in U S West Phoenix Forbearance Proceeding at 7.

[252] *See* CompTel Comments in U S West Phoenix Forbearance Proceeding at 6-7; MCI Comments in U S West Phoenix Forbearance Proceeding at 10-13; AT&T Comments in U S West Phoenix Forbearance Proceeding at 9-10; Sprint Comments in U S West Phoenix Forbearance Proceeding at 10-11; Qwest Comments in U S West Phoenix Forbearance Proceeding at 3.

[253] ALTS *ex parte* statement of June 25, 1999, at 13.

[254] *See, e.g.*, MCI Oct. 26 Comments at 36-37.

trunking basket are generally at the maximum permitted under the price cap rules.[255] First, the existing rules clearly limit price cap LECs' ability to respond to competition. Price cap LECs are subject to both our Part 61 rules regarding rate levels and the mandatory rate structure rules set forth in Part 69 of our rules. Our rules precluding LECs from offering contract tariffs and limiting volume and term discount offerings may create a price umbrella for competitors. Second, as mentioned above, delaying regulatory relief imposes costs on carriers and the public, the latter of which is deprived of the benefits of more vigorous competition. We see no public benefit in any further delay in regulatory relief, once an incumbent LEC has satisfied the triggers we adopt below. Finally, price cap LECs were required to eliminate at least some of the headroom in the trunking basket as a result of the X-Factor increase adopted in *Price Cap Fourth Report and Order*.[256] Observing that there is no headroom in the trunking basket does not necessarily mean, therefore, that price cap LECs face no competition, because we cannot know the extent to which the X-Factor puts downward pressure on rates that the price cap LECs otherwise might have lowered in response to competition.

b. Dedicated Transport and Special Access Services, Other than Channel Terminations

93. We conclude that incumbent price cap LECs are entitled to Phase I pricing flexibility for dedicated transport services (entrance facilities, direct-trunked transport, and the flat-rated portion of tandem-switched transport) and special access services other than channel terminations upon demonstrating that competitors have collocated[257] in 15 percent of an incumbent LEC's wire centers in the MSA, or in wire centers accounting for 30 percent of the incumbent LEC's revenues from these services. The relief granted upon satisfaction of this Phase I trigger, together with the relief we grant immediately in Sections III and V above, is comparable to much of the relief proposed by Bell Atlantic and Ameritech in their 1998 *ex parte* statements.[258] We rely in part on the record developed in response to Bell Atlantic's and Ameritech's proposals in developing our Phase I triggers. Bell Atlantic proposes granting relief when competitors have collocated facilities, purchased UNEs, or installed their own

[255] *See, id.* at 37-38.

[256] *Price Cap Fourth Report and Order*, 12 FCC Rcd 16642.

[257] For purposes of this Order, we use the terms "collocation" and "collocated" to refer to operational collocation arrangements, *i.e.*, arrangements serving at least one customer. *See* Ameritech Forbearance Petition, Att. A at 26.

[258] We streamline the regulation of new services in Section III, and we grant greater flexibility to deaverage rates for services in the trunking basket in Section V. In addition, upon satisfying the Phase I triggers, an incumbent LEC may offer volume and term discounts and contract tariffs under the Commission's framework. Bell Atlantic and Ameritech propose all these forms of relief, plus growth discounts, X-Factor reductions, and service band index (SBI) increases. We do not permit these flexibilities in Phase I, for reasons discussed below.

facilities in 25 percent of the wire centers in the market area.[259] Ameritech recommends granting relief when competitors have collocated in wire centers serving 25 percent of the demand in a market area, measured on a DS1-equivalent basis.[260] MCI, however, recommends deferring relief until competitors account for at least 50 percent of the revenue in a market or 50 percent of the channel terminations between end offices and customer premises.[261]

94. As we explain above, we conclude that it is appropriate to give incumbent LECs pricing flexibility when competitors have made irreversible, sunk investment in facilities.[262] For the reasons discussed above, UNEs do not represent sunk investment in facilities used to compete with incumbent LECs in the provision of special access and dedicated transport services, and so we reject Bell Atlantic's proposal that we include purchase of UNEs as a measure of competitive presence within a wire center. We also reject Bell Atlantic's proposal that we grant flexibility when competitors have collocated facilities *or* installed their own facilities in 25 percent of the wire centers in the market area.[263] Although the presence of competitive facilities within a wire center may well be the best evidence of irreversible investment, this type of trigger is neither simple to administer nor easily verifiable. Our review of the records developed in response to the pending forbearance petitions indicates widespread disagreement among the parties as to the scope and reach of competitive facilities within a particular geographic area.[264] A competitor has "installed its own facilities" within a wire center if, for example, it has laid fiber anywhere within the area served by the wire center, but a separate analysis is required to determine what proportion of the incumbent's customers the competitor can serve with those facilities. Our desire to avoid these administratively burdensome proceedings compels us to adopt collocation as a measure of competitive presence.

95. We recognize, however, that evidence of collocation may underestimate the extent of competitive facilities within a wire center, because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed incumbent LEC facilities.

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[259] Bell Atlantic *ex parte* statement of April 27, 1998, at 20.

[260] Ameritech *ex parte* statement of June 5, 1998, at 2.

[261] MCI Oct. 26 Comments at 55.

[262] Our conclusions concerning whether an incumbent LEC is entitled to pricing flexibility in no way prejudge either the Commission's approach to or the outcome of the pending proceeding pertaining to the obligations of incumbent LECs to provide unbundled network elements. *See UNE Remand FNPRM.*

[263] Bell Atlantic *ex parte* statement of April 27, 1998, at 20.

[264] *See, e.g.*, U S West Phoenix Forbearance Petition in CC Docket No. 98-157, at 12-14; MCI Opposition in U S West Phoenix Forbearance Proceeding, CC Docket No. 98-157, at 8 (dispute over reach of competitive facilities in Phoenix MSA).

For this reason, and because the Phase I relief we are granting is not as extensive as that sought by the incumbent LECs,[265] we find that a threshold lower than 25 percent is warranted. Based on the information submitted in support of several pending petitions for forbearance,[266] it appears that collocation in 15 percent of an incumbent's wire centers in an MSA represents significant investment in competitors' facilities. For example, Bell Atlantic reports that competitors have collocated in 17.9 percent of its wire centers in the Norfolk LATA,[267] and that competitors have installed about 2200 miles of fiber in that LATA.[268] In three SBC MSAs in which competitors have collocated in slightly more than 15 percent of SBC's wire centers,[269] SBC reports that competitors' networks average at least 736 miles.[270] This figure seems conservative because SBC reports figures for only a few of its competitors within these

[265] We explain below that we reject proposals to permit growth discounts or X-Factor reductions as forms of regulatory relief. In addition, Bell Atlantic advocates permitting incumbent LECs limited upward pricing flexibility. Bell Atlantic *ex parte* statement of April 27, 1998, at 22. We do not permit any upward pricing flexibility in Phase I.

[266] For the purposes of this rulemaking, we need not determine whether the studies submitted in support of the pending forbearance petitions justify the relief sought in those proceedings. The firm conducting those studies, Quality Strategies, Inc., bases its conclusions on surveys of telecommunications customers in an MSA. *See, e.g.*, SBC Forbearance Petition, Att. A at 45-46. Several commenters criticize the Quality Strategies studies as providing inadequate support for the BOCs' claims of market share loss. *See, e.g.*, Hyperion Opposition to SBC Forbearance Petition, CC Docket No. 98-27, at 4-6; KMC Opposition to SBC Forbearance Petition, CC Docket No. 98-27, at 2-4; Logix Opposition to SBC Forbearance Petition, CC Docket No. 98-27, at 3-6. Only AT&T questions Quality Strategies's data on the extent of competitors' investment, however. AT&T Opposition to SBC Forbearance Petition, CC Docket No. 98-27, at 8 n.10. In reply, SBC maintains that AT&T did not provide sufficient detail for its claims regarding the extent of competitors' investment but theorizes that the difference between the AT&T and Quality Strategies data results from differences in the size of the areas analyzed. For example, SBC claims that AT&T probably focuses on downtown Los Angeles, while Quality Strategies examined the entire Los Angeles area. SBC Reply in SBC Forbearance Proceeding, CC Docket No. 98-227, Att. 1 at 9. SBC is persuasive on this point. Therefore, without reaching the issue of whether we can base market share determinations on the Quality Strategies studies, we find that we can rely on those studies to supplement the record in this proceeding regarding where competitors have collocated or installed facilities in certain MSAs.

[267] Bell Atlantic Forbearance Petition, Att. C at 25.

[268] *Id.*, Exh. 10 at 2.

[269] Those MSAs are Sacramento (8 wire centers; 21 percent); Houston (11 wire centers; 18 percent); and San Antonio (6 wire centers; 21 percent). SBC Reply in SBC Forbearance Proceeding, CC Docket No. 98-227, Att. 2.

[270] Competitors have installed at least 400 route miles of fiber in Sacramento, at least 1228 route miles in Houston, and at least 580 miles in San Antonio. SBC Forbearance Petition, Att. A at 14, 38, 41.

MSAs.[271] Because a competitor must devote significant time and expense to establish each collocation arrangement,[272] the extent of collocation in those three SBC MSAs indicates that competitors have made considerable investment in these MSAs. We conclude, therefore, that collocation by competitors in 15 percent of the incumbent LEC's wire centers in an MSA is the appropriate trigger for Phase I relief with respect to dedicated transport services and special access services other than channel terminations.

96. Our selection of this 15 percent threshold and the other thresholds we adopt below, like ratemaking issues, is not an exact science.[273] Rather, the thresholds are policy determinations based on our agency expertise, our interpretation of the record before us in this proceeding,[274] and our desire to provide a bright-line rule to guide the industry. This latter factor counsels against adoption of triggers that may provide more comprehensive measures of competition but impose heavy burdens on both industry and the Commission. Our effort to select triggers that precisely measure competition for particular services also is hampered by the lack of verifiable data concerning competitors' revenues and facilities. Unlike incumbent LECs, competitors are not subject to Commission reporting requirements, and they often are unwilling to provide this information voluntarily. Given these constraints, we adopt triggers that, in our reasoned judgment, balance both the desires for precision and simplicity and the costs to carriers and customers alike of delaying the grant of pricing flexibility.

97. In some cases, a few wire centers may account for a disproportionate share of revenues for a particular service. For instance, Bell Atlantic claims that 93 percent of its special access demand measured on a DS-1 equivalent basis is concentrated in 20 percent of its wire centers.[275] Although, as we explained above, measuring demand on a DS-1 equivalent basis overstates competitors' presence, we nevertheless find that Bell Atlantic has shown that demand is often concentrated in particular areas. We find that collocation in wire centers representing a significant percentage of incumbent LEC revenues from a particular service also indicates meaningful investment by competitors. Accordingly, we will permit

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[271] SBC provides route mileage data for only two of its three competitors in Sacramento, and only two of its four competitors in San Antonio. In Houston, SBC claims that TCG's network is comprised of 600 to 800 route miles. SBC Forbearance Petition, Att. A at 14, 38, 41.

[272] *See* Section VI.C.2.a. *supra.*

[273] *See* United States v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983) (*United States v. FCC*) (citing Association of American Publishers, Inc., v. Governors of the United States Postal Service, 485 F.2d 768, 773 (D.C. Cir. 1973)).

[274] *United States v. FCC*, 707 F.2d at 618 (citing Permian Basis Area Rate Cases, 390 U.S. 747, 790 (1968); Sun Oil Co. v. FPC, 445 F.2d 764, 767 (D.C. Cir. 1971)).

[275] Bell Atlantic Forbearance Petition, Att. A at 2.

price cap LECs to satisfy the Phase I trigger on a revenue basis, as well as by showing that competitors have collocated in a percentage of incumbent LEC wire centers in an MSA.

98. We conclude that the revenue-based trigger should be higher than the trigger based on percentage of wire centers in the MSA in which competitors have collocated. If certain wire centers account for a disproportionate share of revenues, then we need to establish revenue-based thresholds higher than the percentage-based threshold to ensure that competitors have extended their networks beyond a few revenue-intensive wire centers. Ameritech recommends granting relief if competitors have collocated in wire centers providing service to 25 percent of the demand for transport services measured on the basis of DS1-equivalents.[276] MCI advocates conditioning relief on competitors achieving a 50 percent market share in revenue terms.[277] Based on these pleadings, we conclude that incumbents will qualify for Phase I relief upon demonstrating that competitors have collocated in wire centers accounting for 30 percent of the incumbent's revenues for special access (other than channel terminations) and dedicated transport services.

99. Bell Atlantic asserts that a revenue-based trigger is unworkable because the proper allocation of revenues among offices for a special access or dedicated transport services routed through multiple offices might be open to dispute.[278] Bell Atlantic's argument is unpersuasive with respect to channel terminations because those services are not routed through intermediate offices. With respect to other special access and dedicated transport services, however, we agree that there is a revenue allocation issue. Access customers order special access and dedicated transport services to provide a transmission path between two customer-designated locations.[279] We therefore direct any LEC seeking pricing flexibility to allocate 50 percent of the revenue from a dedicated service routed through multiple offices to the office at each end of the transmission path, unless it can make a convincing case in its petition that some other allocation would better represent the extent of competitive entry in the MSA at issue. Although a 50 percent allocation rule seems reasonable, we cannot conclude that other allocation schemes might not also be reasonable under the circumstances. Although this is not a bright-line test like we have adopted elsewhere in this Order, determining whether a petitioner has made a convincing showing on this allocation issue should not be difficult.

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[276] Ameritech *ex parte* statement of June 5, 1998, at 2.

[277] MCI Oct. 26 Comments at 55.

[278] Bell Atlantic *ex parte* statement of May 27, 1999, at 8-9.

[279] *See, e.g.*, Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, Tentative Decision, 8 FCC Rcd 1059, 1063-64 (1993); Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, Memorandum Opinion and Order, Tentative Decision, 12 FCC Rcd 7026, 7042 (1997).

c. Channel Terminations

100. We conclude that pricing flexibility for channel terminations requires separate consideration of the degree of competition for channel terminations between an IXC POP and LEC serving wire center and channel terminations between a LEC end office and customer premises. Accordingly, incumbent LECs qualify for Phase I pricing flexibility with respect to channel terminations between an IXC POP and a LEC serving wire center by showing that competitors have collocated in 15 percent of the wire centers in an MSA, or in wire centers accounting for 30 percent of incumbent LEC revenues from these services. With respect to channel terminations between a LEC end office and a customer premises, incumbent LECs qualify for Phase I pricing flexibility by showing that competitors have collocated in 50 percent of incumbent LEC wire centers in the MSA, or in wire centers accounting for 65 percent of incumbent LEC revenues from these services.[280]

101. We find that channel terminations between a LEC end office and a customer premises warrant different treatment than other special access and dedicated transport services.[281] ALTS recommends treating channel terminations separately from other special access and dedicated transport services because channel terminations are not substitutes for those services.[282] MCI recommends granting relief in the transport market only upon a showing that competitors have captured a 50 percent market share in revenue terms, or 50 percent of the channel terminations between end offices and customer premises.[283]

102. We agree that pricing flexibility for channel terminations between a LEC end office and a customer premises requires a higher threshold than flexibility for other dedicated

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[280] The triggers we adopt here for granting pricing flexibility for particular services do not vary according to the technology employed. For example, the Commission found that certain digital subscriber line (DSL) services offered by incumbent LECs are special access services. *See* GTE Telephone Operating Cos. GTOC Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22480 (1998); Bell Atlantic Telephone Cos., *et al.*, CC Docket Nos. 98-168, 98-161, 98-167, 98-103, Memorandum Opinion and Order, 13 FCC Rcd 23667, 23675 (1998). Accordingly, we will grant LECs pricing flexibility for the provision of these services upon satisfaction of the Phase I or Phase II criteria for channel terminations between an end office and a customer's premises.

[281] *See* MCI Oct. 26 Comments at 57 (noting that, if a CLEC does not build to all locations using its own facilities, it must collocate in incumbent LEC wire centers and rely on incumbent LEC facilities for the path between the end office and the customer premises).

[282] ALTS *ex parte* statement of June 25, 1999, at 10.

[283] MCI Oct. 26 Comments at 55. Upon this showing, MCI would permit incumbent LECs to offer contract tariff services. MCI Oct. 26 Comments at 48. MCI opposes any intermediate regulatory relief, arguing that our current rules afford incumbent LECs adequate pricing flexibility and that no more flexibility is warranted until incumbents can show that they face "substantial competition." MCI Oct. 26 Comments at 57-59. At most, MCI would permit incumbent LECs to increase their zone density pricing zones from three to five. MCI Oct. 26 Comments at 58-59.

transport and special access services. Entrance facilities, direct-trunked transport, channel mileage, and the flat-rated portion of tandem-switched transport all involve carrying traffic from one point of traffic concentration to another. Thus, entering the market for these services requires less investment per unit of traffic than is required, for example, for channel terminations between an end office and customer premises. Furthermore, investment in entrance facilities enables competitors to provide service to several end users, while channel terminations between an end office and customer premises serve only a single end user. Accordingly, competitors are likely to enter the market for entrance facilities, direct-trunked transport, channel mileage, and the flat-rated portion of tandem-switched transport before they enter the market for channel terminations between a LEC end office and a customer premises.[284] We therefore adopt a higher threshold for granting flexibility for these channel terminations than for other special access and dedicated transport services.

103. This higher threshold is warranted for another reason. As a number of parties indicate, a competitor collocating in a LEC end office continues to rely on the LEC's facilities for the channel termination between the end office and the customer premises, at least initially, and thus is susceptible to exclusionary pricing behavior by the LEC,[285] and so collocation by competitors does not provide direct evidence of sunk investment by competitors in channel terminations between the end office and the customer premises. We recognize, therefore, the shortcomings of collocation as a measure of competition for channel terminations between end offices and customer premises, but it appears to be the best option available to us at this time. MCI's suggestion that LECs show that competitors have captured 50 percent of the market for these services[286] is problematic because market share determinations are unreliable in the absence of verifiable data regarding competitors' revenues. The Commission has, to date, engaged only in voluntary data collection with respect to competitive providers of telecommunications services, and those efforts are not satisfactory for providing a comprehensive picture of the degree of competition in the marketplace. AT&T's most recent proposal to measure competition for channel terminations by comparing revenue represented by competitive facilities to revenue represented by incumbent LEC facilities suffers from the same deficiency.[287] AT&T acknowledges that data used to support the revenue measure is not now available, either to the Commission or to the incumbents that would be required to satisfy any such trigger; it states that the data "would be developed by and drawn from the industry as necessary, subject to appropriate certification and verification

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[284] *See* MCI Oct. 26 Comments at 55; Bell Atlantic *ex parte* statement of April 27, 1998, at 14; Ameritech Forbearance Petition, Att. A at 26-26 and exh. 2.

[285] *See* MCI Oct. 26 Comments at 64 (If a competitor relies on collocation, it cannot provide an alternative to incumbent's channel terminations between the central office and the customer premises unless the incumbent offers unbundled loops at cost-based rates).

[286] MCI Oct. 26 Comments at 55.

[287] *See* AT&T *ex parte* statement of July 29, 1999, at 2.

procedures."[288] Although we welcome suggestions from AT&T and others about the desirability of formal reporting requirements, we are not prepared to defer pricing flexibility to seek comment on those proposals.[289]

104. Despite the shortcomings of using collocation to measure competition for channel terminations, moreover, it seems likely that a new market entrant would provide channel terminations through collocation and leased LEC facilities only on a transitional basis and will eventually extend its own facilities to reach its customers. It also seems likely, therefore, that the extent to which competitors have collocation arrangements in an MSA is probative of the degree of sunk investment by competitors in channel terminations between the end office and the customer premises throughout the MSA. In addition, as we discuss above, collocation is a conservative measure of competition in that it does not measure competition from competitors that bypass LEC facilities altogether. Given the lack of other data in the record, therefore, we conclude that it is reasonable to rely on collocation as a proxy for irreversible, sunk investment in channel terminations between the end office and the customer premises and to set the applicable thresholds high enough to account for the limitations inherent in this trigger. Based on this reasoning, we reach two conclusions: (1) we must require incumbent LECs to make separate showings for each kind of channel termination; and (2) the thresholds for channel terminations between the end office and the customer premises must be higher than the thresholds for channel terminations between the IXC POP and the serving wire center.

105. Thus, we reject incumbent LEC recommendations to the extent that they advocate adoption of the same triggers for all channel terminations as for other dedicated transport and special access services. Instead, we adopt a trigger for channel terminations between a LEC end office and a customer premises based in part on MCI's recommendation that incumbent LECs must demonstrate that competitors have gained a 50 percent market share in revenue terms, or 50 percent of the channel terminations between end offices and customer premises. In order to avoid administratively burdensome market share determinations, however, we adopt collocation rather than market share as a measure of competitive presence. Specifically, we will permit Phase I pricing flexibility for channel terminations between an incumbent LEC's end office and customer premises when competitors have collocated in 50 percent of incumbent LEC wire centers in the MSA. Bell Atlantic reports that competitors have collocated in 50 percent of its wire centers in two LATAs, New York Metro and Philadelphia.[290] Furthermore, Bell Atlantic states that its

[288] AT&T *ex parte* statement of July 29, 1999, at 1.

[289] AT&T's latest proposal that the Commission collect revenue data from competitors is not reflected in the comments it submitted in response to the December 1996 *Access Reform NPRM* or in response to the *October 5 Public Notice.*

[290] Bell Atlantic Forbearance Petition, Att. C at 25.

competitors in Philadelphia include AT&T, with a 300-mile network,[291] and MCI, with a 100-mile network.[292] Bell Atlantic also lists five other competitors providing service in Philadelphia.[293] It seems likely that some of that investment is in channel terminations, suggesting that collocation in 50 percent of the wire centers in a geographic area correlates to sunk investment in channel terminations. Accordingly, we conclude that collocation in 50 percent of an incumbent LEC's wire centers within an MSA is an appropriate threshold for channel terminations between that LEC's end office and customer premises.

106. As we found above with respect to dedicated transport and other special access services, demand for these channel terminations may be fairly concentrated. Therefore, we also permit incumbent LECs to demonstrate that competitors have collocated in wire centers accounting for 65 percent of incumbent LEC revenues from these services. This 65 percent threshold is 15 percent higher than the trigger based on percentage of the wire centers in an MSA where competitors have collocated. This 15 percent difference is consistent with the difference in the triggers we adopted for dedicated transport and other special access services, *i.e.*, wire centers accounting for 30 percent of the incumbent LEC's revenues for those services, or collocation at 15 percent of the wire centers in the MSA.

107. We also find, however, that a lower threshold is warranted for channel terminations between a LEC serving wire center and an IXC POP. As explained above, competition is likely to develop first for those services that carry traffic between points of high traffic concentration. Moreover, a competitor collocated at a LEC serving wire center provides the channel termination to an IXC POP over its *own* facilities.[294] We conclude that incumbent LECs may demonstrate sunk investment by competitors with respect to these channel terminations if competitors have collocated in 15 percent of the wire centers in an MSA, or in wire centers accounting for 30 percent of the demand, measured by revenues, for these channel terminations in the MSA. Because these channel terminations carry traffic between points of concentration similar to the points connected by entrance facilities, we conclude that they should have the same trigger.

3. Phase I Triggers for Other Switched Access Services

108. We conclude that an incumbent price cap LEC should be allowed Phase I pricing flexibility for common line and traffic-sensitive services, and the traffic-sensitive

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[291] *Id.*, Exh. 7 at 2.

[292] *Id.*, Exh. 7 at 1.

[293] Those competitors are Hyperion, Intermedia Communications, Inc., NEXTLINK, Metromedia Fiber Network, Inc., and Winstar Communications, Inc. *Id.*, Exh. 7 at 4-6.

[294] As we explained above, a competitor collocated at a LEC end office generally leases *LEC* facilities to reach end user customers.

components of tandem-switched transport service, when it demonstrates that competitors, in aggregate, offer service over their own facilities to at least 15 percent of incumbent LEC customer locations in the MSA.[295]

109. We conclude above that Phase I relief for a particular service is warranted when an incumbent LEC demonstrates that competitors have made irreversible investment in facilities used to compete with the incumbent LEC in the provision of that service. For special access and dedicated transport services, we adopt a trigger based on collocation by competitors because competitors historically have collocated in incumbent LEC wire centers in order to provide transport and special access services.[296] Thus collocation furnishes evidence of irreversible investment in facilities in part because it indicates competitive transmission facilities terminating at the collocation site.[297] Although we acknowledge that some competitors provide these services exclusively over their own facilities (total facilities bypass), the extent of such competition is difficult to measure. Because collocation traditionally has served as the building block for competitive transport services, we conclude that it constitutes a sufficient measure of the degree to which competitors have invested in facilities to provide these services.

110. Competition for common line and traffic-sensitive services, however, is a much more recent phenomenon, and it may not develop in this same manner. For this reason, a different approach to granting pricing flexibility for these services is warranted. For traffic-sensitive and common line services, we adopt a Phase I trigger that takes into account competitors that have wholly bypassed incumbent LEC facilities, as well as competitors that collocate in incumbents' wire centers so as to provide service over unbundled loops.

111. The 1996 Act opened the local exchange market and, hence, the market for switched access services, to competition.[298] The Act envisions three alternatives that competitors might employ, either singly or in combination, to enter this market: total service resale, service using unbundled network elements, and service provided over the competitor's

[295] Tandem-switched transport has three components: a per-minute charge for transport of traffic over common transport facilities between the incumbent LEC's end office and the tandem switching office; a per-minute tandem switching charge; and a flat-rated charge for transport of traffic over dedicated transport facilities between the serving wire center and the tandem switching office. 47 C.F.R. § 69.111(a)(2). For the purposes of this section, we include traffic-sensitive components of tandem-switched transport service in the term "traffic-sensitive service." We address Phase I pricing flexibility for the dedicated component of tandem-switched transport, *supra*, in Section VI.C.2.b.

[296] *See* Section VI.C.2, *supra*.

[297] *See* Section VI.C.2.a, *supra*.

[298] *See, e.g., Access Reform NPRM*, 11 FCC Rcd at 21358-59.

own facilities.[299] Not all of these entry strategies, however, indicate that competitors have made irreversible investment in facilities used to compete with incumbents in the provision of switched access services. As we explain above,[300] resold services employ only incumbent LEC facilities and thus do not indicate any irreversible investment by competitors whatsoever. Similarly, a competitor providing service solely over unbundled network elements leased from the incumbent (the so-called "UNE platform"[301]) has little, if any, sunk investment in facilities used to compete with the incumbent LEC.[302] For these reasons we do not allow an incumbent LEC to qualify for Phase I relief as a result of competition solely from resale or unbundled network elements.

112. If, however, competitors offer switched access services either entirely over their own facilities or by combining unbundled loops with their own switching and transport, this indicates the type of irreversible investment in facilities that warrants Phase I pricing flexibility for these services. In the first case, the competitor bypasses incumbent facilities altogether; in the latter case, a competitor must collocate in an incumbent's wire center to connect the leased loops to its transport facilities. Although a trigger based solely on collocation is administratively simpler and more easily verified, we decline in this case to adopt such a trigger because we lack sufficient experience with competition in the local exchange and switched access markets to know the extent to which competitors might rely on either of these entry strategies. We note, for example, that the time and expense required to establish collocation arrangements[303] and the difficulties associated provisioning of UNEs by incumbent LECs[304] may encourage competition through total bypass. Because it is unclear, therefore, the extent to which competitors are pursuing UNE-based entry strategies,[305] we conclude that data concerning total bypass may be particularly important in assessing the degree of competitive entry in the markets for switched services.

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[299] *See, e.g., Local Competition Order*, 11 FCC Rcd at 15509.

[300] *See* Section VI.C.2.a, *supra*.

[301] *See Ameritech Michigan Order*, 12 FCC Rcd at 20628.

[302] *See* Section VI.C.2.a, *supra*.

[303] *See id. See also* Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761, 4771-93 (1999).

[304] *See, e.g., Second BellSouth Louisiana Order*, 13 FCC Rcd at 20652-706.

[305] INDUSTRY ANALYSIS DIVISION, COMMON CARRIER BUREAU, FCC, LOCAL COMPETITION, at Tables 3.4, 3.5 (1998) (Table 3.4 presents lines provided by large incumbent LECs to CLECs for resale, Table 3.5 presents lines provided by large incumbent LECs to CLECs as UNE loops).

113. Rather than looking solely at collocation, therefore, we adopt a Phase I trigger for switched services that measures the extent to which competitors offer these services either exclusively or largely over their own facilities. We will grant Phase I pricing flexibility for common line and traffic-sensitive services to an incumbent LEC in an MSA if that LEC demonstrates that competitors offer service over their own facilities to 15 percent of the incumbent's customer locations in the MSA. As we explain above, a competitor provides service over its own facilities if it leases unbundled loops but provides its own switching and transport. A competitor is not, however, offering service over its own facilities to the extent it offers service through resale or exclusively through the use of unbundled network elements. We acknowledge that we have concluded, both for determining eligibility for universal service support under section 254(e) of the Act and for BOC applications under section 271 to provide in-region interLATA services, that a carrier's "own" facilities include UNEs provided by the incumbent LEC.[306] For purposes of this Order, however, we use "own facilities" in a narrower sense, excluding UNEs provided by the incumbent LEC, except in the case of CLECs using unbundled loops in conjunction with their own switching and transport facilities.

114. We also decline at this time to permit incumbents to satisfy the Phase I trigger by showing that customer locations are served by mobile wireless competitors. Although Congress allowed the Commission to consider competition from Personal Communications Service (PCS) in the context of Bell Operating Company (BOC) applications for in-region interLATA authority when PCS serves as a substitute for the BOC's services,[307] inclusion and evaluation of such data is problematic for purposes of determining whether an incumbent LEC is entitled to Phase I pricing flexibility, primarily because it is difficult to assess whether mobile (as opposed to fixed) wireless serves as a substitute for (and thus competes with) wireline service provided by an incumbent LEC.[308]

115. In arriving at the 15 percent trigger, we note that the relief granted upon satisfaction of the Phase I trigger for common line and traffic-sensitive services, together with the relief we grant immediately in Sections III and V above, is comparable to much of the

[306] *See* Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 8862 (1997) (*Universal Service Order*); *Ameritech Michigan Order*, 12 FCC Rcd at 20598.

[307] *See* 47 U.S.C. § 271(c)(1)(A); *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20621-25.

[308] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20625-30.

switched services relief proposed in *ex parte* submissions by Bell Atlantic,[309] Ameritech,[310] and USTA.[311]

116. Bell Atlantic recommends granting relief when competitors have "demonstrated the capability" to provide service in wire centers representing, in aggregate, at least 25 percent of the demand for the service in question, *i.e.*, residential/single-line-business and multi-line business.[312] Under Bell Atlantic's proposal, competitors have demonstrated the ability to provide service in a wire center if they provided service with their own or ported telephone numbers to any of the relevant class of customers.[313] Ameritech proposes granting relief when competitors have collocated in wire centers serving 25 percent of the demand in a market area, measured on an interstate minutes-of-use basis.[314] USTA also proposes a 25 percent threshold, but bases it on the sum of line demand attributable to (1) wire centers in which there is operational collocation *and* competitors are taking unbundled loop or

[309] Bell Atlantic *ex parte* statement of April 27, 1998. Bell Atlantic proposes that, upon a showing that 25 percent of wire centers are "competitive" (based on the existence of any competitor-served telephone number in the wire center), we allow incumbent LECs to deaverage common line and local switching charges; offer volume and term pricing with growth options; offer promotions; and seek approval on an expedited basis to respond to requests for proposals (RFPs). *Id.* at 27. (Bell Atlantic proposes that we grant incumbent LECs some of this relief, such as geographic deaveraging, on a lesser showing).

[310] Ameritech *ex parte* statement of June 5, 1998, at 2. Ameritech proposes that, upon a showing that competitors have collocated in incumbent LEC wire centers accounting for 25 percent of interstate local switching minutes-of-use, we allow incumbent LECs to deaverage common line and local switching charges; offer bundled service packaging, contracts, and volume and term pricing (with growth options); and provide new services on a relaxed basis. *Id.* at 2. (Ameritech proposes that we grant incumbent LECs some of this relief, such as geographic deaveraging, on a lesser showing).

[311] USTA *ex parte* statement of June 1, 1999. USTA proposes that, upon a showing that 25 percent of total lines in a market have "access to" alternative facility-based local services (*i.e.*, all lines served by a wire center with operational collocation and lines located within a 1000 feet of another provider's facility), we allow incumbent LECs to deaverage subscriber line charges (SLCs) and local switching charges; offer volume and term pricing; offer contracts and promotions; and seek approval on an expedited basis to respond to RFPs. *Id.* at 1. (USTA proposes that we grant incumbent LECs some of this relief, such as geographic deaveraging, on a lesser showing).

[312] Bell Atlantic *ex parte* statement of April 27, 1998, at 27.

[313] *Id.* Bell Atlantic proposes that a wire center also be classified as "competitive" if competitors use collocation and UNEs to provide service in the wire center. *Id.* Because UNE customers would be served through CLEC-ported or "owned" telephone numbers, this test appears to be merely a subset of the telephone number test.

[314] Ameritech *ex parte* statement of June 5, 1998, at 2.

unbundled local switching UNEs and (2) lines located within 1000 feet of competitive facilities.[315]

117. For the reasons we discuss above, we find that a competitor has not made irreversible investment in facilities to provide common line and/or traffic-sensitive services unless it does so through its own facilities. We therefore reject the triggers proposed by the incumbent LECs and USTA to the extent they can be satisfied by UNE platform and resale competition.[316] Given, however, that we require evidence that competitors offer service over their own facilities, and that we do not grant relief as extensive as that sought by the incumbent LECs, we adopt a trigger lower than the 25 percent threshold they propose. We will therefore grant an incumbent LEC Phase I relief for common line and traffic-sensitive services when it demonstrates that competitors, in aggregate, offer service over their own facilities to at least 15 percent of incumbent LEC customer locations in the MSA. Because competitive provision of both local switching and traffic-sensitive components of tandem switched transport service are dependent on switch ownership, we conclude that Phase I relief for these services should be tied directly to the Phase I relief for common line services.

118. We reject Bell Atlantic and USTA's proposals that we allow incumbent LECs to qualify for pricing flexibility by class-of-service, *e.g.*, for residential/single-line-business and multi-line business service,[317] because we wish to encourage competition for both high-volume business customers and residential and low-volume business customers.

119. We acknowledge that demonstrating the degree to which competitors are providing service over their own facilities is more administratively burdensome than merely measuring the extent to which competitors have collocated in incumbent LEC wire centers.[318] As discussed above, however, total bypass may represent a significant portion of competition for switched access services,[319] thus we will not rely solely on collocation as a measure of

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[315] USTA *ex parte* statement of June 1, 1999, at 2.

[316] Customers served via resale or the UNE platform may represent significant numbers of "owned" or "ported" telephone numbers. Similarly, evidence of competitors using unbundled local switching UNEs does not, by itself, indicate competitors' investment in facilities.

[317] Like Bell Atlantic, USTA proposes that incumbent LECs may target showings to, and therefore request relief for, residential/single-line-business or multi-line business services. USTA *ex parte* statement of June 1, 1999. USTA notes that when an incumbent LEC makes a separate showing for residential/single-line-business services, it may be appropriate to use a total bypass threshold less than 1000 feet. *Id.*

[318] *See* Section VI.C.2.a, *supra.*

[319] In establishing our Phase I trigger for dedicated transport and special access services, based on our experience observing the development of the market for these services, we find it reasonable to use collocation as a proxy for all forms of competition in the market for such services. As discussed, *supra*, however, we do not have such a history to evaluate in the switched access market and therefore are not as able to predict the

competition for these services. We therefore conclude that any increased administrative burdens in measuring total facilities bypass competition are in the public interest.

120. We emphasize that incumbent LECs must demonstrate that competitors actually offer, not merely are capable of offering, common line and traffic-sensitive services to 15 percent of an incumbent LEC's customer locations within an MSA to qualify for Phase I relief. On the other hand, we are not requiring that competitors actually provide service to a specific percentage of customers. "Offering service" is an appropriate measure of competitive entry for these services because of the difficulties inherent in determining the extent to which competitors actually provide service to current or former customers of the incumbent. This constitutes sensitive competitive information that the incumbent may be unable, and a competitor unwilling, to provide. Moreover, we see no need to require this information. In contrast to special access or even dedicated transport services, competitors are likely to employ more broadly based entry strategies for common line and traffic-sensitive services. Once a competitor installs a switch in its network, it has every incentive to maximize the number of customers it serves with that switch, in order to spread the sunk switch investment over the broadest base possible. In addition, special access services may have diminished the demand among high volume users for competitive switched services, because high volume customers use special access as an alternative to switched access, an option that is not available to low volume users of switched services. Thus switched-based competitors may be more likely to seek customers through mass marketing than through highly-targeted sales.

121. We do not establish rules pertaining to how an incumbent LEC might demonstrate that competitors "offer service" over their own facilities. As we note above, competitors are likely to market switched services broadly, thus we expect that competitors will advertise their services in a variety of media. These advertisements may well be probative of the extent of competitive offerings. Furthermore, incumbents are aware, of course, of competitors' purchase of unbundled loops, and the pending forbearance petitions suggest that they possess considerable intelligence regarding the extent and location of competitive facilities.

4. Phase I Relief

a. Introduction

122. Upon satisfaction of the Phase I triggers for particular services, we will permit price cap LECs to file, on one day's notice, tariffs offering volume and term discounts for those services, and we also will permit them to file contract tariffs for those services on one day's notice. Price cap LECs must remove their contract tariff offerings from price cap

relationship between collocation and total-facilities bypass-based entry in the switched access market.

regulation.[320] Currently, an incumbent LEC is free to lower its access rates as much as it wants,[321] provided that it lowers its rates throughout the study area or density pricing zone in question.[322] Under our Phase I regulatory relief, incumbent LECs are no longer required to choose between lowering a rate throughout the area at issue or not lowering the rate at all. Price cap LECs are required to maintain generally available tariffs subject to price cap regulation for all access services, however, so that access customers can choose between obtaining services pursuant to contract tariff or generally available tariff. This ensures that no access customer will be required to pay dramatically higher access rates as a result of Phase I pricing flexibility. In this section, we explain why we conclude that these two forms of relief are warranted in Phase I.

b. Volume and Term Discounts

123. *Background.* Price cap LECs currently may offer volume and term discounts for special access services without any competitive showing.[323] The Commission also permits incumbent LECs to offer cost-based volume and term discounts for several switched transport services[324] when competitors have purchased either (1) 100 DS1-equivalent switched transport cross-connects in the incumbent LEC's "zone 1" wire centers, or (2) an average of 25 DS1-equivalent switched transport cross-connects per zone 1 wire center.[325] By "cost-based"

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[320] Ad Hoc supports removing services offered under contract tariffs from price cap regulation. Ad Hoc Reply to U S West Phoenix Forbearance Petition, CC Docket No. 98-157, at 15-16. We address below the low-end adjustment issues raised by the removal of contract-tariff offerings from price cap regulation.

[321] In the *Price Cap Third Report and Order*, the Commission eliminated the lower service band indices. *Price Cap Third Report and Order*, 11 FCC Rcd at 21487-88.

[322] Section 69.3(e)(7) requires all incumbent LECs to charge uniform rates throughout each study area. *See* 47 C.F.R. § 69.3(e)(7). The Commission permitted incumbent LECs offering expanded interconnection to deaverage their special access and switched transport rates into three density pricing zones once demand for collocation services reached certain thresholds. *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7454; *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7426-27; *Virtual Collocation Order*, 9 FCC Rcd at 5196-97; 47 C.F.R. §§ 61.47(e), 69.123. We relax these rules in Section III above, however.

[323] *See Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7458-65.

[324] These switched transport services are entrance facilities, interoffice mileage, and tandem-switched transport. *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7433-34.

[325] *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7434-36. In the *Special Access Expanded Interconnection Order*, the Commission allowed incumbent LECs with operational expanded interconnection offerings to implement a system of traffic-density-related rate zones, to bring special access rates more in line with costs. *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7454. The Commission later expanded density zone pricing to switched transport. *See Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7426-27; *Virtual Collocation Order*, 9 FCC Rcd at 5196-97. For purposes of this Order, we use "zone 1" to refer to the zone with the heaviest traffic density.

discounts, the Commission meant that the discounts should be based on per-unit of capacity differences in embedded costs incurred to provide high-volume service relative to the costs of non-high-volume offerings.[326] In the *Access Reform NPRM*, the Commission invited comment on expanding volume and term discount authority upon satisfaction of Phase I triggers.[327]

124. *Discussion.* Upon satisfaction of the Phase I triggers, we find that price cap LECs should be permitted to offer volume and term discounts to enable them to respond to competition.[328] Prohibiting incumbent LECs from offering volume and term discounts when they have satisfied the Phase I triggers could distort the market for access services by preventing incumbent LECs from competing efficiently. In addition, permitting volume and term discounts creates little headroom that an incumbent could use to increase rates for other access services. For several years, the Commission has allowed volume and term discounts for certain access services in the trunking and traffic-sensitive baskets.[329] There is nothing in the record before us to suggest either that the headroom resulting from those discounts has led to unreasonable rate increases for other access services in those baskets, or that headroom resulting from expanded volume and term discount authority will lead to unreasonable rate increases for other access services in those baskets in the future. Unlike contract tariffs, moreover, volume and term discounts are not tailored to individual customers, and incumbent LECs must make them available to any customer with sufficient volumes or willing to commit to a given term.[330]

125. Several parties do not oppose volume and term discounts in their entirety, but rather oppose allowing volume and term discounts under conditions that might enable incumbent LECs to lock in customers or discriminate in favor of incumbents' long distance

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[326] *See Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7463; *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7433.

[327] *Access Reform NPRM*, 11 FCC Rcd at 21435-38.

[328] *See* USTA Comments at 28, 49, and Att. 1 at 30-31; USTA Reply at 26-27; Citizens Comments at 17-18; PacTel Comments at 26; U S West Comments at 32-33; Ameritech Comments at 41 and Att. B at 36; BA/NYNEX Comments at 49; BA/NYNEX Reply at 23-24; BellSouth Comments at 33-34; Cincinnati Bell Comments at 18; GTE Comments at 48; SNET Comments at 18; SNET Reply at 14-15. This authority to offer volume and term discounts upon satisfaction of the Phase I triggers is in addition to the existing authority price cap LECs have to offer volume and term discounts.

[329] *See Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7458-65; *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7433-34.

[330] Volume and term discounts for services in the common line basket raise issues that are not presented by volume and term discounts for services in the traffic-sensitive and trunking baskets. We address common line issues further in Section VI.D.3 of this Order, *infra*.

affiliates.[331] The Phase I triggers we adopt above condition incumbent LEC volume and term discounts upon irreversible, sunk investment by competitors, thus making it less likely that an incumbent will try to use volume and term discounts to lock in customers. In addition, section 202 of the Act[332] and our existing enforcement procedures are adequate to address unreasonable discrimination.[333]

126. According to MCI, the Commission proposed permitting volume discounts to facilitate the development of rate structures that reflect the manner in which costs are incurred. MCI argues further that the *Access Reform First Report and Order* eliminated inefficiencies in the common line and local switching rate structures, and so volume discounts are no longer warranted for these services.[334] Contrary to these arguments, however, the Commission proposed relaxing volume and term discount requirements not only to encourage incumbent LECs to develop efficient rate structures, but also to avoid distorting the market or impeding the development of effective competition.[335] Therefore, the rate structure revisions adopted in the *Access Reform First Report and Order* do not obviate the need for relaxing volume discount requirements.

127. The Illinois Commission supports permitting incumbent LECs to offer volume and term discounts, but it recommends setting a price floor at total service long incremental cost (TSLRIC), or some other measure of forward-looking economic costs, below which such discounts would not be permitted because they could be anticompetitive.[336] Historically, the Commission has required incumbent LECs to develop rate structures that reflect the manner in which they incur costs.[337] Rate structures that are not cost-based tend to result in implicit subsidies between high-volume and low-volume users.[338] We find that this concern is reduced, however, when the incumbent has met the Phase I trigger, because the existence of sunk investment by competitors limits the incentive to engage in anticompetitive pricing behavior. Furthermore, we will consider complaints filed under section 208 of the Act

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[331] AT&T Comments at 80-81; MCI Comments at 58-59; Sprint Comments at 43-45; ACTA Comments at 18.

[332] 47 U.S.C. § 202.

[333] We address concerns regarding growth discounts below.

[334] MCI Nov. 9 Reply at 34-35 (citing *Access Reform First Report and Order*, 11 FCC Rcd at 21437).

[335] *Access Reform First Report and Order*, 11 FCC Rcd at 21437.

[336] Illinois Commission Comments at 21.

[337] Investigation of Interstate Access Tariff Non-Recurring Charges, CC Docket No. 85-166, Phase I, Part 3, 2 FCC Rcd 3498, 3501-02 (1987).

[338] *Access Reform First Report and Order*, 12 FCC Rcd at 15998.

alleging that a rate charged pursuant to a volume discount is unreasonably low, in violation of section 201 of the Act.[339] Moreover, any volume or term discount that results in a below-cost offering would give rise to an antitrust claim,[340] which provides further protection to competitors. As a result, we conclude that the benefits of permitting volume and term discounts without requiring a cost showing outweigh any possible costs. We will not require that LECs demonstrate that the volume and term discounts they may offer at Phase I are cost-based.

c. Contract Tariffs

128. Upon satisfaction of the Phase I triggers, we will permit price cap incumbent LECs to offer interstate access services pursuant to contract tariff. Access customers benefit from contract tariffs because they enable incumbent LECs to tailor services to their customers' individual needs. Incumbent LECs argue that they should be permitted to offer access services on a contract carriage basis, in part because these arrangements are common elsewhere in telecommunications and other industries.[341] We agree that, once competitors have made irreversible, sunk investments in their networks, continuing to prohibit incumbent LECs from offering services under contract tariff could reduce the efficiency of the market for access services by reducing the incumbent LECs' ability to meet customers' needs.

129. AT&T, Frontier, and MCI submit that incumbent LECs will be able to tailor contract carriage tariffs to such a point that additional customers are unlikely to select the tariff, leaving the incumbent LECs free to discriminate in favor of their affiliates.[342] Although any unreasonable restriction on the availability of contract tariff services would violate Section 202 of the Act,[343] and any party that believes that it may be disadvantaged by an allegedly discriminatory contract tariff offering may file a complaint under section 208 of the Act,[344] we agree that special safeguards are warranted with respect to contracts with affiliates. Permitting incumbent LECs to file contract tariffs on one day's notice provides little opportunity for the Commission or competing carriers to review the terms of the tariffs before they take effect. Issues regarding whether a particular tariff condition is unreasonably

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[339] *See* 47 U.S.C. §§ 201, 208.

[340] *See* 15 U.S.C. § 2; *In re* Air Passenger Computer Reservation Systems Antitrust Litigation, 694 F. Supp. 1443 (C.D. Cal. 1988), *aff'd*, 948 F.2d 536 (9th Cir. 1991).

[341] USTA Comments at 49; BA/NYNEX Comments at 51; BellSouth Comments at 35-36; Ameritech Reply at 12-13; GTE Reply, App. D at 13.

[342] AT&T Comments at 44-45; AT&T Reply at 45; Frontier Comments at 15; MCI Comments at 62. *See also* ACTA Comments at 18.

[343] 47 U.S.C. § 202.

[344] 47 U.S.C. § 208.

discriminatory and whether another carrier is in fact "similarly situated" may prove difficult to determine in a subsequent complaint proceeding, which, in any event, takes time to resolve. We adopt, instead, a bright-line rule to address concerns about discrimination in favor of affiliates. We will not permit an incumbent LEC to offer a contract tariff to an affiliate unless and until an unaffiliated customer first purchases service pursuant to that contract.[345]

130. MCI contends that, if price cap LECs are permitted to offer contract tariffs before there is substantial competition in the market, those LECs will deter market entry through targeted rate reductions.[346] We adopt Phase I triggers to ensure that incumbent LECs cannot drive competitors from the market through targeted rate reductions; these safeguards are adequate to address MCI's concern. Moreover, to the extent that an incumbent LEC attempts to use contract tariffs in an exclusionary manner by targeting them to specific customers, the Commission will enforce the requirement that they make contract tariffs available to all similarly situated customers.[347]

131. Intermedia argues that granting incumbent LECs contract tariff authority will result in a price squeeze with respect to facilities-based CLECs that purchase UNEs, because the Commission has adopted average variable cost as a price floor for incumbent LEC wholesale and retail rates.[348] According to Intermedia, CLECs providing service through the use of unbundled network elements are unable to compete with incumbent LEC services priced at average variable cost, because the Commission's pricing methodology for UNEs, Total Element Long Run Incremental Cost (TELRIC), includes costs, including joint and common costs, depreciation, and a reasonable profit,[349] that are excluded from the calculation of average variable cost.[350] Intermedia proposes that the Commission address this price squeeze by requiring resale, at a wholesale discount, of all incumbent LEC contract tariff offerings and volume and term discounts.[351] Intermedia's concerns about potential a potential price squeeze are best addressed in the context of a complaint filed under section 208 of the Act alleging that a rate charged pursuant to a contract tariff or volume or term discount is

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[345] Once the Commission grants BOCs permission, pursuant to section 271 of the Act, 47 U.S.C. § 271, to provide in-region long distance services, they are required to offer those services through separate affiliates. *See* 47 U.S.C. § 272. Similarly, the Commission's rules require incumbent independent (non-BOC) LECs to offer in-region long distance services through separate affiliates. *See* 47 C.F.R. § 64.1903.

[346] MCI Oct. 26 Comments at 61-62. *See also* Time Warner Oct. 26 Comments at 14-16.

[347] *See Interexchange Competition Order*, 6 FCC Rcd at 5897.

[348] Intermedia *ex parte* statement of July 14, 1999, at 2.

[349] *See Local Competition Order*, 11 FCC Rcd at 15850-56.

[350] Intermedia *ex parte* statement of July 14, 1999, at 2.

[351] *Id.* at 4-5.

unreasonably low and thus violates section 201.[352] We note in this regard that such a complaint is not subject to dismissal merely because a given rate is at or above average variable cost; average variable cost is not necessarily a "reasonable" rate.

132. MCI and Time Warner argue that AT&T was permitted to offer contract tariff service only when the Commission found that AT&T faced "substantial competition," and that allowing incumbent LECs to offer contract carriage on a lesser showing is inconsistent with that precedent.[353] We find that the precedent cited by MCI and Time Warner is not entirely on point, because, in contrast to the relief granted to AT&T, Phase I relief does not permit price cap LECs to provide services completely outside of price cap regulation.[354] Rather, price cap LECs will be required to maintain generally tariffed access service offerings subject to price cap regulation. Because we are granting incumbent LECs much less pricing flexibility at Phase I than the Commission granted AT&T pursuant to the *Interexchange Competition Order*, we do not require price cap LECs to show that they face substantial competition.

133. Ameritech and Bell Atlantic also seek permission to respond to requests for proposals (RFPs).[355] We find that the contract tariff authority we grant here is sufficient to enable price cap LECs to respond to RFPs, and so we need not grant any further pricing flexibility for this purpose. ALTS maintains that granting flexibility to respond to RFPs is inconsistent with a previous Commission Order terminating an investigation, in which the Commission concluded that a Southwestern Bell tariff revision designed to respond to RFPs was unreasonably discriminatory.[356] ALTS's concern is unfounded. First, Southwestern Bell sought to respond to any RFP that indicated that the request involved a competitive situation.[357] Unlike the Phase I triggers we adopt in this Order, Southwestern Bell's tariff did not in any way indicate whether its competitors had made irreversible investment in facilities. Second, the Commission's decision rested in part on Southwestern Bell's failure to submit

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[352] *See* 47 U.S.C. §§ 201, 208.

[353] MCI Comments at 60-61; Time Warner Comments at 31-33; MCI Nov. 9 Reply at 41 (citing *Interexchange Competition Order*, 6 FCC Rcd 5880).

[354] *See Interexchange Competition Order*, 6 FCC Rcd at 5894.

[355] Bell Atlantic *ex parte* statement of April 27, 1998, at 22; Ameritech *ex parte* statement of June 5, 1998, at 3.

[356] ALTS *ex parte* statement of June 25, 1999, at 25 (quoting Southwestern Bell Telephone Company, CC Docket No. 97-158, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311, 19336 (1997) (*Southwestern Bell Transmittal 2633 Order*)).

[357] *See Southwestern Bell Transmittal 2633 Order*, 12 FCC Rcd at 19317.

adequate evidence of competition in its region at that time.[358] The Commission did not decide, as ALTS seems to imply, that any RFP authority is inherently unreasonable. Finally, the Commission noted the pendency of this rulemaking proceeding, and that the record in this proceeding might provide a basis for permitting contract tariffs or competitive response tariffs.[359] Thus, rather than precluding consideration of this RFP issue, the *Southwestern Bell Transmittal 2633 Order* expressly contemplated addressing that issue in this Order.

d. Growth Discount

134. We reject Ameritech's and Bell Atlantic's proposal to allow incumbent LECs to offer growth discounts.[360] Growth discounts refer to pricing plans under which incumbent LECs offer reduced per-unit access service prices to customers that commit to purchase a certain percentage above their past usage, or plans that offer reduced prices based on growth in traffic placed over an incumbent LEC's network.[361] The Commission tentatively decided not to permit growth discounts in the *Access Reform NPRM*, because they create an artificial advantage for BOC long distance affiliates with no subscribers, relative to existing IXCs and other new entrants.[362] The Commission also invited parties to comment on whether growth discounts would enhance the development of competitive access markets.[363]

135. None of the parties supporting growth discounts explains why growth discounts enhance the development of competitive access markets. Instead, Ameritech asserts that the Commission could rely on the tariff review process to ensure that any growth discounts do not unreasonably advantage the incumbent LEC's long distance affiliate.[364] Without any affirmative benefit to growth discounts presented in the record before us, we have no basis for allowing such discounts.

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[358] *Id.* at 19334-35.

[359] *Id.* at 19339.

[360] Bell Atlantic *ex parte* statement of April 27, 1998, at 21, 29; Ameritech Oct. 26 Comments, Att. N at 9-10.

[361] *Access Reform NPRM*, 11 FCC Rcd at 21437.

[362] *Id.* at 21437-38.

[363] *Id.* at 21438.

[364] Ameritech Oct. 26 Comments, Att. N at 9-10.

e. X-Factor Reductions

136. Ameritech, Bell Atlantic, and USTA recommend reducing or eliminating the X-Factor in the price cap index (PCI) formula as competition grows.[365] This regulatory relief is not warranted. Phase I pricing flexibility is designed to grant incumbent LECs more flexibility to lower prices for particular customers without subjecting other customers to higher rates. Because competition may not be sufficient to constrain prices throughout an MSA at Phase I, we require LECs to maintain their generally available tariffs in order to protect access customers. If we were to lower the X-Factor as competition increases, then the price cap-constrained tariffs might not be adequate to protect access customers from rate increases.

137. Ameritech maintains that the X-Factor should be eliminated in its proposed "Phase II," which is roughly analogous to our Phase I, because competitive pressures will constrain the incumbent LEC's ability to earn excessive profits.[366] We find this reasoning unpersuasive, because the services for which the incumbent feels competitive pressure are the ones most likely to be offered under contract tariff, outside of price cap regulation. Therefore, the services that remain subject to price cap regulation are likely to be those for which the incumbent faces less competition.

138. Moreover, the Commission designed price cap regulation in part to replicate, to the extent possible, the results of a competitive market.[367] Generally, as more competitors enter a market, supply increases, and this additional supply puts downward pressure on prices. Conversely, lowering the X-Factor decreases downward pressure on prices. Thus, lowering the X-Factor as competition increases would produce exactly the opposite result of a competitive market, thereby undercutting one of the Commission's goals in adopting price cap regulation.

f. Other Price Cap Revisions

139. We reject the proposal by several LECs to consolidate the existing price cap baskets into one basket.[368] Ameritech states that this restructuring would permit incumbent

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[365] Ameritech *ex parte* statement of June 5, 1998, at 3; Bell Atlantic ex parte statement of April 27, 1998, at 10; USTA Oct. 26 Comments at 37 and Att. E; *see also* SBC Oct. 26 Comments at 20. In price cap regulation, the "X-Factor" limits access rate increases. Access services are grouped into "baskets," and the weighted average of the rates in each basket may not exceed the price cap index (PCI). The PCI is adjusted annually by a measure of inflation minus the X-Factor. *See Price Cap Fourth Report and Order*, 12 FCC Rcd at 16647-48.

[366] Ameritech Oct. 26 Comments, Att. N at 9-10.

[367] *LEC Price Cap Performance Review*, 10 FCC Rcd at 9002.

[368] Ameritech Oct. 26 Comments, Att. N at 9-10; USTA Oct. 26 Comments at 37, Att. E; SBC Oct. 26 Comments at 20.

LECs to raise prices for some services to offset reductions in prices for other services.[369] Nothing in the record suggests that the customers facing increased prices under this kind of pricing flexibility are likely to have many competitive alternatives relative to customers that benefit from price reductions. Thus, consolidating price cap baskets would deprive access customers of protection that remains necessary at Phase I.

140. For similar reasons, we also decline to adopt Bell Atlantic's suggestion that we increase upper service band index (SBI) limits to 10 percent per year for transport services upon satisfaction of its proposed "Phase II" triggers, which are similar to the Commission's Phase I triggers.[370] Increasing the upper SBI limits upon satisfaction of our Phase I triggers could enable the incumbent LEC to increase a customer's access rates before that customer has a competitive alternative.[371]

5. Phase II for Special Access and Dedicated Transport

a. Introduction

141. We adopt Phase II triggers comparable to our Phase I triggers: we will grant Phase II pricing flexibility to incumbent LECs when competitors have collocated in a certain percentage of the incumbent's wire centers in an MSA, or in wire centers generating a certain percentage of an incumbent's revenues for the services at issue within the MSA. Because Phase II grants incumbent LECs considerably greater flexibility than Phase I, we adopt triggers to ensure that competitors have established a significant market presence, *i.e.*, that competition for a particular service within the MSA is sufficient to preclude the incumbent from exploiting any monopoly power over a sustained period.[372] Upon a Phase II showing for special access and dedicated transport services within an MSA, we will relax the price cap rules and the Part 69 rate structure requirements applicable to those services in that MSA.[373]

142. By significant market presence, we mean that IXCs have a competitive alternative for dedicated transport services needed to reach the majority, although not necessarily all, of their long distance customers throughout the MSA, and that almost all special access customers have a competitive alternative. We find that Phase II regulatory

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[369] Ameritech Oct. 26 Comments, Att. N at 9-10.

[370] Bell Atlantic *ex parte* statement of April 27, 1998, at 21.

[371] *See* Ad Hoc Oct. 26 Comments at 30.

[372] As we explain further in this Order below, determining that an incumbent LEC cannot exploit monopoly power over a sustained period is not equivalent to finding that carrier to be non-dominant. *See* Section VI.C.4.b, *infra*.

[373] Part 69 does not prescribe a rate structure for special access services.

relief is warranted upon satisfaction of the Phase II triggers within an MSA, even though such relief might lead to higher rates for access to some parts of an MSA that lack a competitive alternative, for several reasons. First, the customers for the services we address in this section are IXCs and large businesses, not residential or small business end users. These large and sophisticated customers generate significant revenues for the incumbent and are not without bargaining power with respect to the incumbent.

143. Second, delaying Phase II regulatory relief until access customers have a competitive alternative for access to each and every end user might give competitors the ability to "game the system." In other words, competitors might be able to prevent an incumbent from obtaining pricing flexibility in an MSA simply by choosing not to enter certain parts of that MSA or to serve certain customers. We will not distort the operation of the market in this manner.

144. Finally, because regulation is not an exact science,[374] we cannot time the grant of regulatory relief to coincide precisely with the advent of competitive alternatives for access to each individual end user. We conclude that the costs of delaying regulatory relief outweigh the potential costs of granting it before IXCs have a competitive alternative for each and every end user. The Commission has determined on several occasions that retaining regulations longer than necessary is contrary to the public interest. Almost 20 years ago, the Commission determined that regulation imposes costs on common carriers and the public, and that a regulation should be eliminated when its costs outweigh its benefits.[375] More recently, the Commission recognized that retaining tariffing requirements for non-dominant IXCs imposes costs in the form of a less efficient market.[376] In Section III of this Order, we conclude that the new service rules currently in effect limit incumbents' incentives to innovate. The Part 69 rate structure can impose costs on an incumbent LEC by limiting its ability to develop rate structures in response to market forces. Thus, retaining the Part 69 rate structure imposes costs on society by perpetuating inefficiencies in the market for interstate access services. The triggers we adopt for Phase II flexibility are sufficient to ensure that incumbent LECs cannot exercise any remaining monopoly power indefinitely. If an incumbent LEC charges an unreasonably high rate for access to an area that lacks a competitive alternative, that rate will induce competitive entry, and that entry will in turn

[374] *United States v. FCC*, 707 F.2d at 618.

[375] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1, 3 (1980) (*Competitive Carrier First Report and Order*). The Court later overturned this Order, but only because the Commission did not have authority under the Communications Act at that time to forbear from regulation, not because it erred in determining that the costs of regulation can outweigh its benefits. *See* MCI v. FCC, 765 F.2d 1186, 1195-96 (D.C. Cir. 1985); AT&T v. FCC, 978 F.2d 727, 736 (D.C. Cir. 1992).

[376] Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20762-63 (1996).

drive rates down. Accordingly, we will not delay Phase II regulatory relief until access customers have a competitive alternative for access to every end user.

145. As we did in Phase I, we establish different triggers for (1) special access services (other than channel terminations) and dedicated transport services, and (2) channel terminations. In this section of the Order, we adopt triggers for each of these services and adopt specific forms of regulatory relief for Phase II. In the Notice accompanying this Order, we invite interested parties to comment on Phase II triggers for other switched access services.

b. Phase II Triggers

146. We note above that the regulatory relief proposed by Ameritech and Bell Atlantic for "Phase II" is analogous to our Phase I relief. Here, we find that Ameritech's and Bell Atlantic's Phase III proposals are analogous to the Phase II relief we adopt here.[377] Therefore, we rely in part on the record developed in response to Bell Atlantic's and Ameritech's proposals in developing our Phase II triggers. Bell Atlantic proposes granting relief when competitors have collocated facilities, purchased UNEs, or installed their own facilities in 75 percent of the wire centers in the market area.[378] Ameritech recommends granting relief when competitors have collocated in wire centers serving 75 percent of the demand in a market area, measured on a DS1-equivalent basis.[379]

147. Access customers must have competitive alternatives throughout most of an MSA before we can grant Phase II regulatory relief to an incumbent LEC. The Ameritech and Bell Atlantic proposals recognize that our Phase II triggers must be high enough to ensure that competitive alternatives for the services at issue exist in the area for which flexibility is granted. The triggers we adopt, however, differ from those recommended by these incumbent LECs in two respects: as in Phase I, (1) we base our Phase II triggers on collocation in either a certain percentage of wire centers in an MSA, or in wire centers generating a certain percentage of the revenues for the services at issue in an MSA; and (2) we conclude that different services warrant different thresholds.

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[377] In addition to all the forms of regulatory relief we grant immediately in Sections III and V of this Order and that we will grant upon satisfaction of Phase I triggers, in Phase II, we will (1) relax our Part 69 rate structure rules, and (2) permit price cap LECs to offer access services completely outside of price cap regulation. Ameritech and Bell Atlantic recommend removing services from price cap regulation upon demonstration that an incumbent LEC has met their Phase III criteria. Ameritech *ex parte* statement of June 5, 1998, at 3; Bell Atlantic *ex parte* statement of April 27, 1998, at 22. USTA also recommends removing services from price caps upon its Phase III showing, and recommends eliminating Part 69 rate structure requirements upon a Phase I showing. USTA Oct. 26 Comments at Att. E.

[378] Bell Atlantic *ex parte* statement of April 27, 1998, at 21.

[379] Ameritech *ex parte* statement of June 5, 1998, at 2.

148. We determined in our Phase I analysis above that evidence of collocation may underestimate the extent of competitive facilities within a wire center, because it fails to account for the presence of competitors that have wholly bypassed incumbent LEC facilities. For this reason, we adopt a threshold lower than the 75 percent recommended by Ameritech and Bell Atlantic. For dedicated transport, and for special access services other than channel terminations, we grant Phase II pricing flexibility to incumbent LECs that demonstrate that competitors have collocated in 50 percent of an incumbent LEC's wire centers in the MSA at issue. SBC has shown that competitors have collocated in 51 percent of its wire centers in the San Diego MSA.[380] According to SBC, competitors' networks in this MSA comprise at least 1150 route miles, and there are more than 360 buildings on those networks.[381] Similarly, competitors have collocated in 58 percent of SBC's wire centers in the Los Angeles MSA.[382] SBC submits that competitors' networks in this MSA comprise more than 2530 route miles, and there are more than 950 buildings on those networks.[383] We explain above that establishing an operational collocation arrangement requires considerable time and expense.[384] This evidence suggests that collocation in 50 percent of an incumbent LEC's wire centers corresponds to considerable investment by competitors in transmission facilities and the ability of competitors to serve customers in a large number of buildings.

149. As we explain in our Phase I discussion, a few wire centers may account for a disproportionate share of revenues for a particular service. For this reason, we also will grant Phase II pricing flexibility for these services upon a demonstration that competitors have collocated in wire centers accounting for 65 percent of the incumbent LEC's revenues from those services in an MSA. Similarly, we will grant Phase II pricing flexibility for channel terminations between an IXC POP and a LEC serving wire center when an incumbent demonstrates that competitors have collocated in 50 percent of its wire centers in an MSA, or in wire centers accounting for 65 percent of the incumbent's revenue for this service. As we explained in our discussion of Phase I triggers above, these services carry traffic between points of high traffic concentration and therefore warrant lower triggers than those we adopt for channel terminations between a LEC end office and a customer premises.

150. We adopt higher thresholds for channel terminations between an incumbent LEC's end office and customer premises, for the reasons we offered in our Phase I analysis. For these channel terminations, Phase II relief is available to LECs that demonstrate that

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[380] SBC Reply in SBC Forbearance Proceeding, CC Docket No. 98-227, Att. 2.

[381] SBC Forbearance Petition, Att. A at 10.

[382] SBC Reply in SBC Forbearance Proceeding, CC Docket No. 98-227, Att. 2. For purposes of its forbearance petition, SBC treats the Long Beach and Orange County MSAs as one MSA.

[383] SBC Forbearance Petition, Att. A at 10.

[384] Section VI.C.2, *supra*.

competitors have collocated in 65 percent of the incumbent LEC's wire centers in the MSA at issue, or in wire centers accounting for 85 percent of the incumbent's revenues from those services in that MSA. Because these services do not carry traffic between points of high traffic concentration, and because the collocated competitors still rely on incumbent LEC facilities to reach the end user, we find that higher thresholds are warranted.

151. MCI argues that price cap LECs should be permitted Phase II regulatory relief, such as removal of services from price cap regulation, only when those LECs are "non-dominant," *i.e.*, no longer have market power in the provision of the services at issue.[385] We conclude that the Phase II regulatory relief we grant below is warranted when competitors have established a significant market presence in an MSA, and we need not require a showing of non-dominance. Upon a Phase II showing, we will not grant incumbent LECs all the regulatory relief we afford to non-dominant carriers. Specifically, incumbent LECs in Phase II are still required to file generally available tariffs, while non-dominant LECs and CAPs are permitted, but not required, to file tariffs.[386] Furthermore, our relief is limited to certain services and certain areas, and will be granted only upon satisfaction of the triggers we adopt here. Thus, Phase II relief is not tantamount to non-dominant treatment.

152. In the *Interexchange Competition Order*, the Commission allowed AT&T to remove some interexchange services from price cap regulation based on a finding of "substantial competition," but it based that finding on a more detailed analysis than the Phase II triggers we adopt here, including an examination of, *inter alia*, demand and supply elasticities, pricing behavior, and market share.[387] We conclude that this detailed substantial competition test is not warranted for special access and dedicated transport services because we grant incumbent LECs pricing flexibility only on a MSA-by-MSA basis, while the Commission granted AT&T pricing flexibility on a nationwide basis. Furthermore, the administrative burdens of a detailed substantial competition test are magnified when done on an MSA-by-MSA basis, and we believe our collocation-based triggers are sufficient to ensure that we do not grant pricing flexibility prematurely. Accordingly, we will rely on collocation-based triggers to indicate when competitors have established a significant market presence that warrants Phase II relief for special access and dedicated transport services.[388]

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[385] MCI Oct. 26 Comments at 48.

[386] *See* Hyperion Telecommunications, Inc. Petition Requesting Forbearance, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596, 8611-12 (1997).

[387] *See Interexchange Competition Order*, 6 FCC Rcd at 5887-93.

[388] We seek comment on Phase II relief for common line and traffic-sensitive services in the accompanying Notice.

c. Phase II Relief

153. Upon satisfaction of the Phase II triggers we adopt above for special access and dedicated transport services, we will no longer require price cap LECs to comply with our Part 69 rate structure rules or Part 61 price cap rules with respect to those services within an MSA. An incumbent LEC should be permitted to remove services from price cap regulation when that LEC's competitors have established a significant market presence in the provision of those services.[389] A significant market presence in an MSA ensures that the incumbent will not be able to exploit any monopoly power for a sustained period. We will, however, continue to require LECs to maintain generally available tariffs, but we will permit them to file such tariffs on one day's notice. In this section, we explain why we conclude that these two forms of relief are warranted upon satisfaction of the Phase II triggers.

154. Currently, Part 69 of the Commission's rules prescribes a rate structure for all switched access services, including dedicated transport. USTA recommends eliminating the Part 69 rate structure as a form of regulatory relief.[390] In addition, in Section III above, we eliminate rate structure requirements for new services. We agree that elimination of our Part 69 rate structure rules for existing dedicated transport services is warranted, but not until the incumbent LEC meets our Phase II requirements. As explained in more detail in Section VIII.C. below, a rate structure can create implicit subsidies if it does not reflect accurately the manner in which incumbent LECs incur the costs of providing a service. Therefore, rate structure rules are necessary in the absence of a significant market presence by competitors. Once competitors have established a significant market presence in an MSA, however, we believe it is no longer necessary to impose efficient rate structures on incumbent LECs. Therefore, we will eliminate our rate structure rules for particular services once an incumbent LEC demonstrates the development of a significant market presence by competitors for those services by satisfying the Phase II trigger. Retaining our price cap and rate structure rules until LECs are non-dominant is unwarranted because doing so would delay the action of competition in setting efficient rate levels and rate structures.

155. We recognize that the regulatory relief we grant upon a Phase II showing may enable incumbent LECs to increase access rates for some customers. We conclude that this relief nonetheless is warranted upon a Phase II showing for two reasons. First, some access rate increases may be warranted, because our rules may have required incumbent LECs to price access services below cost in certain areas. Second, we find that a Phase II showing is sufficient evidence that competitors' market presences have become significant, and that the public interest is better served by permitting market forces to govern the rates for the access services at this point. In addition, we note that these services generally are purchased by

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[389] In the *LEC Price Cap Order*, the Commission explained that it is unnecessary to extend the efficiency incentives of price cap regulation to services offered on a "contract-type basis." *LEC Price Cap Order*, 5 FCC Rcd at 6810.

[390] USTA Oct. 26 Comments, Att. E.

IXCs, not individual end users. IXCs are sophisticated purchasers of telecommunications services, fully capable of finding competitive alternatives where they exist and determining which competitor can best meet their needs.

156. We decline to adopt any other Phase II regulatory relief proposed in the *Access Reform NPRM*. Two of those proposals, elimination of price cap service categories[391] and consolidation of price cap baskets,[392] are not relevant because Phase II relief removes services from price cap regulation.

157. The *Access Reform NPRM* also proposed allowing incumbent LECs to charge IXCs different rates for access to different classes of end user.[393] Ameritech argues that class-of-customer pricing would enable incumbent LECs to respond to competition.[394] We find that the pricing flexibility we grant in Phase I and Phase II is sufficient to enable incumbent LECs to respond to competition. Bell Atlantic argues that class-of-customer pricing is simply another form of deaveraging.[395] We grant price cap LECs considerable flexibility to deaverage their rates in Section V of this Order, and Bell Atlantic does not explain why deaveraging by class of customer is necessary to enable incumbent LECs to respond to competition. Thus, the record does not provide a basis for granting this relief.

D. Price Cap Issues

1. Revision of Price Cap Indices

158. We have determined that no adjustment to price cap LECs' PCIs is warranted when a LEC removes demand associated with services offered pursuant to contract tariff from a price cap basket, or when an entire service is removed from price cap regulation pursuant to a Phase II showing. When the Commission permitted AT&T to remove commercial long distance services from price cap regulation, it did not require AT&T to make any exogenous cost adjustment to the PCI for the basket from which those services were removed.[396] Specifically, the Commission found that the removal of an individual service from a basket

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[391] *Access Reform NPRM*, 11 FCC Rcd at 21445.

[392] *Id.* at 21447-48.

[393] Specifically, the Commission proposed allowing incumbent LECs to charge an IXC different rates for local switching and transport services based on the class of end user to which the IXC provides long distance service. *Id.* at 21445-46.

[394] Ameritech Comments at 46.

[395] BA/NYNEX Comments at 51. *See also* USTA Comments at 28.

[396] Revisions to Price Cap Rules for AT&T Corp., CC Docket No. 93-197, Report and Order, 10 FCC Rcd 3009, 3019 (1995) (*Commercial Services Order*).

has no effect on the PCI, and it affects the API only by altering the base period revenue weights of the services remaining in the basket at the time a carrier revises some other rate in that basket.[397] Thus, removing individual services from price cap regulation has only a *de minimis* effect on the headroom for the services remaining in the basket.[398]

159. In accordance with this precedent, we do not require incumbent LECs to make any exogenous adjustment to their PCIs to reflect the removal of demand associated with contract tariff services from price cap regulation. Although the Commission did require a "recalibration" of AT&T's PCIs when other services were removed from price cap regulation,[399] we find that the recalibration required by those Orders is not needed for removal of contract tariff demand. In those cases, the Commission removed all the services except one service category from the basket in question. Because the service band indices (SBIs) were designed to limit cross-subsidization between different types of services within a basket, and there is no danger of cross-subsidization when there is only one service category remaining in the basket, the Commission recalibrated AT&T's PCIs and APIs to eliminate the SBI for the remaining basket without affecting the headroom AT&T had previously.[400] In the case of the relief we provide here, however, incumbent LECs will remove only some demand for some services from a basket; therefore, we will retain the SBIs, and there is no need for the recalibration we required of AT&T.

2. Low-End Adjustment Mechanism

160. *Background.* In the *LEC Price Cap Order*, the Commission adopted the low-end adjustment mechanism, which permits incumbent LECs earning rates of return less than 10.25 percent in a given year to increase their PCIs to a level that would enable them to earn 10.25 percent.[401] The Commission decided to retain the low-end adjustment mechanism in the *Price Cap Fourth Report and Order*, to prevent confiscatory price cap rates in cases where differences in economic conditions in different price cap LECs' service regions might cause a LEC to earn a confiscatory return in a given tariff year.[402]

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[397] *Commercial Services Order*, 10 FCC Rcd at 3019.

[398] *See also* USTA *ex parte* statement of Jan. 27, 1999; U S West *ex parte* statement of Jan. 28, 1999.

[399] *Interexchange Competition Second Report and Order*, 8 FCC Rcd at 3671 (removal of all services except 800 directory assistance from Basket 2); *AT&T Non-DominantReinitialization Order*, 11 FCC Rcd 1201 (removal of services except international services from Basket 1).

[400] *Interexchange Competition Second Report and Order*, 8 FCC Rcd at 3671; *AT&T Non-Dominant Reinitialization Order*, 11 FCC Rcd at 1201.

[401] *LEC Price Cap Order*, 5 FCC Rcd at 6804.

[402] *See Price Cap Fourth Report and Order*, 12 FCC Rcd at 16691, 16704-05; *Price Cap Performance Review*, 10 FCC Rcd at 9048.

161. In its petition for reconsideration of the *Price Cap Fourth Report and Order*,[403] AT&T questions whether it is reasonable to retain the low-end adjustment mechanism after the elimination of sharing.[404] In this Order, for the reasons discussed below, we partially grant AT&T's petition on this issue. We will consider other issues raised in AT&T's petition, along with other petitions for reconsideration of the *Price Cap Fourth Report and Order*, in a future Order.

162. *Discussion.* We eliminate the low-end adjustment mechanism for price cap LECs that qualify for and elect to exercise either the Phase I or Phase II pricing flexibility we grant in this Order.[405] AT&T argues that the low-end adjustment mechanism blunts efficiency incentives just as sharing does and that, therefore, retaining it is inconsistent with the Commission's decision to eliminate sharing.[406] AT&T also notes that several LECs opposed retention of the low-end adjustment mechanism, and those that supported it did so only as a means to provide "symmetry" to the sharing obligation.[407] AT&T requests that we eliminate the low-end adjustment mechanism or re-introduce sharing.[408]

163. We conclude that we should eliminate the low-end adjustment mechanism once price cap LECs qualify for and choose to exercise either the Phase I or Phase II pricing flexibility we grant in this Order. We agree with AT&T that the low-end adjustment mechanism tends to blunt efficiency incentives. We also conclude that this effect will be exacerbated by removing contract tariff services from price cap regulation, so that retention of the mechanism would be unreasonable for price cap LECs obtaining pricing flexibility. The low-end adjustment mechanism can create undesirable incentives for price cap LECs when

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[403] *Price Cap Fourth Report and Order*, 12 FCC Rcd 16642. For purposes of this Section VI.D.2 of the Order, except as otherwise noted, "Petition" refers to petitions for reconsideration of the *Price Cap Fourth Report and Order* filed July 11, 1997, "Comments" refers to comments filed in response to those petitions on August 18, 1997, and "Reply" refers to replies filed in response to those petitions on September 3, 1997.

[404] AT&T Petition at 13-16. When price cap regulation included sharing obligations, incumbent LECs were required to "share" half or all their earnings above specified rates of return with their access customers through lower PCIs during the following year. *See Price Cap Fourth Report and Order*, 12 FCC Rcd at 16649. The Commission eliminated sharing obligations in the *Price Cap Fourth Report and Order*, in part because the benefits derived from those obligations were reduced by the adoption of an X-Factor based on a more accurate measure of productivity growth and elimination of multiple X-Factor options. As a result, the efficiency-blunting effects of sharing began to outweigh its benefits. *Id.* at 16699-702.

[405] Streamlined treatment of new services, removal of interexchange services from price caps, and geographic deaveraging of rates for services in the trunking basket do not affect a LEC's entitlement to a low-end adjustment.

[406] AT&T Petition at 13-15.

[407] *Id.* at 13-14; AT&T Reply at 6-7.

[408] AT&T Petition at 15-16.

they move some demand for some services out of price cap regulation. The low-end adjustment is a rate-of-return-based mechanism, and it therefore recreates some of the incentives of rate-of-return regulation, although not to the same extent as sharing obligations.[409] Earnings from non-price cap services are currently not considered part of "total interstate earnings"[410] for purposes of calculating low-end adjustments.[411] As a result, price cap LECs must remove the costs of non-price cap services in order to calculate interstate earnings, and they have an incentive to underallocate those costs in order to minimize measured earnings. Currently, this underallocation incentive is not a serious concern, because non-price cap services represent a very small fraction of the price cap LECs' federally tariffed activities, and so the effects of any underallocation are minimal.[412] Once a LEC has removed a significant amount of demand associated with contract tariff offerings from price cap regulation, however, its incentive to underallocate the costs of non-price cap services and the effects of such underallocation will be greater.

164. Our decision to eliminate the low-end adjustment mechanism for parties obtaining pricing flexibility is consistent with a proposal made by the Ad Hoc Telecommunications Users Committee (Ad Hoc) in response to the *Access Reform NPRM*. Ad Hoc argues that incumbent LECs either should be guaranteed a just and reasonable rate of return and recovery of all of their prudent investment, or they should be permitted to pursue market opportunities and maximize their earnings, but not both.[413] Ad Hoc reasons that an incumbent LEC permitted unlimited profits under price cap regulation should not be shielded

[409] The Commission has concluded that sharing obligations severely blunt the efficiency incentives that it sought to create when it adopted price cap regulation, by requiring price cap LECs earning more than certain rates of return to share half or all those earnings with their customers. *Price Cap Fourth Report and Order*, 12 FCC Rcd at 16699; *LEC Price Cap Performance Review*, 10 FCC Rcd at 9045-46. The low-end adjustment mechanism does not blunt efficiency incentives as much as sharing because it guarantees only a 10.25 percent rate of return, and price cap LECs should be able to achieve much greater profits by trying to increase their productivity growth.

[410] In the *LEC Price Cap Reconsideration Order*, the Commission explained that sharing and the low-end adjustment mechanism are based on total interstate earnings rather than basket-by-basket earnings. *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2679-80. *See also LEC Price Cap Order*, 5 FCC Rcd at 6805. The Commission also determined that sharing and the low-end adjustment mechanism should be based on earnings from all services subject to price cap regulation, rather than earnings exclusively from access services. *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2680-81.

[411] *See LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2681 n.126. Earnings from services excluded from price cap regulation also are excluded from total interstate earnings for purposes of calculating low-end adjustments. *Id.* at 2681-82.

[412] *LEC Price Cap Order*, 5 FCC Rcd at 6810.

[413] Ad Hoc Comments at 66-69.

from any risk of stranded investment.[414] Alternatively, Ad Hoc argues that an incumbent LEC seeking some stranded investment recovery should be subject to 100 percent sharing obligations for all earning in excess of 50 basis points over the authorized rate of return.[415] Although we decline to reimpose sharing obligations, we agree with Ad Hoc that an incumbent LEC seeking pricing flexibility to compete more vigorously in the marketplace should not be afforded any rate-of-return-based protection from any risk associated with its competitive ventures.[416]

165. We have considered whether it is possible to modify the low-end adjustment mechanism to limit the undesirable incentives discussed above. For example, USTA proposed requiring price cap LECs to maintain records regarding demand for services removed from price cap regulation, but permitting them to keep that information confidential. Under USTA's proposal, a price cap LEC seeking to make a low-end adjustment would be required to re-price its removed service demand at an "average price cap tariff rate."[417] It would be difficult, however, for the Commission or other interested parties to verify that a price cap LEC claiming a low-end adjustment has re-priced its contract tariff demand properly. Specifically, whenever a contract tariff offering is a package of two or more access services, USTA's proposal requires the incumbent to allocate the contract rate among the services in the package. It would be difficult for the Commission to determine whether that allocation is reasonable, particularly in cases where the package includes nonregulated services and services removed from price cap regulation pursuant to a grant of pricing flexibility. Therefore, USTA's proposal would not be an adequate safeguard against cross-subsidization.

166. The other possible safeguard that we have considered would require the Commission to specify the cost allocation rules LECs would use to segregate costs and revenues from services in price cap regulation from the costs and revenues of services outside of price cap regulation. Such rules would be burdensome for carriers and the Commission and is inconsistent with the deregulatory framework envisioned by Congress when it adopted the Telecommunications Act of 1996. Indeed, we find that such cost accounting rules would make using the low-end adjustment mechanism just as burdensome as making an above-cap filing. We have retained the low-end adjustment mechanism in part to avoid costly above-cap

[414] *Id.* 67-68.

[415] *Id.* at 67.

[416] Courts also have held that a utility company's captive customers should bear the risk of loss of the utility's investment only if those customers also are permitted to share in the benefits resulting from that investment. *See* Democratic Cent. Comm. of the Dist. of Columbia v. Washington Metro. Area Transit Comm'n, 485 F.2d 786, 805 (D.C.Cir.1973), *cert. denied*, 415 U.S. 935 (1974); AT&T Info. Sys., Inc. v. FCC, 854 F.2d 1442, 1444 (D.C. Cir. 1988).

[417] USTA *ex parte* statement of Jan. 27, 1999, at 3-4.

filings.[418] Burdening the low-end adjustment mechanism with cost allocation rules thus would undercut a major reason for retaining the low-end adjustment mechanism as part of the price cap plan. On the other hand, elimination of the low-end adjustment mechanism for an incumbent LEC might enable the Commission to relax, for that LEC, any accounting rules necessitated only by the rate-of-return-based low-end adjustment mechanism. For all these reasons, we eliminate the low-end adjustment mechanism for price cap LECs obtaining pricing flexibility.

167. Any LEC obtaining Phase I regulatory relief in any MSA will be precluded from making any low-end adjustment throughout its entire, holding-company-wide, service region, regardless of whether it files separate tariffs for each of its study areas. Permitting MSA-by-MSA low-end adjustments would require the same kind of burdensome cost allocation rules that we describe above. Furthermore, eliminating the low-end adjustment will not result in confiscatory rates, because we will continue to permit price cap LECs to make above-cap tariff filings. We also conclude that an above-cap tariff investigation provides the best forum for determining whether the above-cap tariff would implicitly force the LEC's regulated ratepayers to bear some of the risk of the LEC's competitive ventures.[419]

168. We retain the low-end adjustment mechanism for price cap LECs that have not opted to exercise any Phase I or Phase II regulatory relief, however. As we note above, the flexibility we grant in Phase I and Phase II will exacerbate the efficiency-blunting effects of the low-end adjustment mechanism. By the same token, the inefficiencies associated with the low-end adjustment mechanism in the absence of these flexibilities are fairly minor. To be eligible for a low-end adjustment, a price cap LEC must earn less than a 10.25 percent rate of return, which would constitute a substantial earnings sacrifice for most price cap LECs. For those LECs, the benefits of the low-end adjustment mechanism would not justify such a sacrifice, because the mechanism permits only a one-time PCI adjustment to avoid back-to-back annual earnings below 10.25 percent. For this reason, we find that the benefits of retaining the low-end adjustment mechanism for those LECs that have not obtained Phase I or Phase II relief (ensuring that LECs' rates are not confiscatory without requiring above-cap filings) outweigh its effects on efficiency incentives.

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[418] The Commission retained the low-end adjustment mechanism to help prevent price cap regulation from becoming confiscatory. *Price Cap Fourth Report and Order*, 12 FCC Rcd at 16704. The above-cap filing is the only other mechanism in price cap regulation designed explicitly to prevent confiscatory rates. Any above-cap filing must be supported by the following: (1) cost support data broken down to the lowest possible level for each relevant basket for each of the most recent four years under price cap regulation; (2) a detailed explanation of the reasons for the prices of all rate elements to which the LEC does not assign costs; (3) a comprehensive explanation of how the carrier allocated costs among rate elements in the relevant basket; and (4) an explanation of the manner in which the LEC has allocated all costs, not just exogenous costs, among baskets. *LEC Price Cap Order*, 5 FCC Rcd at 6823.

[419] The Commission has stated that it would probably suspend any above-cap filing for the statutory five-month period. *Id.* at 6823-24.

3. Common Line Basket Issues

169. Above, we permit incumbent LECs to offer contract tariffs and volume and term discounts for access services once they satisfy the Phase I triggers. We also have designed our Phase I relief to limit headroom by requiring price cap LECs to remove the demand associated with contract tariff offerings from price caps, so that price cap LECs cannot use that pricing flexibility to raise access rates for those customers in the MSA that lack competitive alternatives. Phase I pricing flexibility for services in the common line basket does not raise the same concerns regarding headroom, because different price cap rules apply to the common line basket. There is no need to require price cap LECs to remove common line services offered pursuant to contract tariff from price caps, nor do we see any need for additional safeguards to prevent the creation of headroom as a result of volume and term discounts for services in the common line basket, because the current rules already preclude the creation of headroom in the common line basket. Specifically, Section 69.152(m) prohibits price cap carriers that choose to charge less than the maximum permitted end user common line charges (EUCLs) from making up any of that revenue through increases to other common line charges (primary interexchange carrier charges (PICCs) or carrier common line CCL) charges).[420] Similarly, Section 69.153 requires incumbent LECs to base their PICC calculations on the maximum revenues permitted under the rules, rather than the actual revenues recovered.[421] Thus, our rules do not permit a LEC to charge a higher PICC for some subscriber lines simply by reducing the PICC for other lines. Finally, Section 69.154 allows price cap LECs to impose CCL charges only to the extent that their permitted common line revenues exceed the maximum amount the LECs could have recovered through EUCLs and PICCs.[422]

E. Procedural Issues

1. Special Access and Dedicated Transport Services

170. *Background.* In the *Access Reform NPRM*, the Commission invited comment on the procedural requirements governing requests for pricing flexibility.[423] The Commission did not propose any specific pleading cycle, but it proposed establishing a deadline for Commission action of 90 days.[424]

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[420] 47 C.F.R. § 69.152(m).

[421] 47 C.F.R. § 69.153.

[422] 47 C.F.R. § 69.154. Other restrictions also apply.

[423] *Access Reform NPRM*, 11 FCC Rcd at 21432, 21444.

[424] *Id.* at 21431.

171. *Discussion.* An incumbent LEC seeking pricing flexibility for special access or dedicated transport services under the framework we adopt in this Order may file a petition with the Commission identifying the relief it seeks and demonstrating that it has satisfied the applicable triggers. Comments on petitions will be due fifteen days after the petition is filed. Replies will be due ten days after the comments are due. The triggers established for special access and dedicated transport services are administratively simple and easy to verify. A relatively short pleading cycle is, therefore, sufficient to enable interested parties to examine the incumbent LEC's petition and to draft a response. We will notify interested parties of a pending pricing flexibility petition through the Competitive Pricing Division's Tariff Public Reference Log. In addition, we require incumbent LECs to submit pricing flexibility petitions through our Electronic Tariff Filing System (ETFS), so that interested parties may obtain copies of petitions through the Commission's website.

172. Incumbent LECs bear the burden of proving that they have satisfied the applicable trigger for the pricing flexibility they seek.[425] An incumbent LEC is in the best position to present evidence of the extent of collocation in its wire centers within an MSA. We also adopt Ameritech's proposal to permit incumbent LECs to file petitions for multiple MSAs, as long as the data in those petitions are disaggregated by MSA.[426] Specifically, to carry its burden of proof, the incumbent may show the following: (1) the total number of wire centers in the MSA; (2) the number and location of the wire centers in which competitors have collocated; (3) in each wire center on which the incumbent bases its petition, the name of at least one collocator that uses transport facilities owned by a provider other than the incumbent to transport traffic from that wire center; and (4) that the percentage of wire centers in which competitors have collocated satisfies the trigger we have adopted with respect to the pricing flexibility sought by the incumbent LEC. Alternatively, the incumbent may show the following: (1) the total base period[427] revenues generated by the services for which the incumbent seeks relief in the MSA for which the incumbent seeks relief; (2) in each wire center on which the incumbent bases its petition, the name of at least one collocator that uses transport facilities owned by a provider other than the incumbent to transport traffic from that wire center; and (3) that the wire centers in which competitors have collocated account for a sufficient percentage of the incumbent's base period revenues generated by the services at issue within the relevant MSA or non-MSA area to satisfy the trigger we have adopted with respect to the pricing flexibility sought by the incumbent LEC. We codify these requirements in a new Section 1.774 of our rules, as set forth in Appendix B to this Order.

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[425] *See* Spectranet Comments at 5-6.

[426] Ameritech Oct. 26 Comments, Att. N at 3, 5.

[427] For price cap LECs, the "base period" is the 12-month period (*i.e.*, the calendar year) ending six months before the effective date of the LECs' annual access tariffs. *See* 47 C.F.R. § 61.3(e).

173. Currently, the Commission's new service rules require price cap LECs to determine the appropriate price cap basket and service band for their new services in the context of a subsequent annual access tariff filing, and to incorporate those new services into those baskets in that annual access filing.[428] Whenever a price cap LEC can demonstrate in an annual access tariff filing that one of its new services would be properly incorporated into a basket or service band for which it has been granted Phase I or Phase II regulatory relief in any MSA or MSAs, it will be granted the same relief in the same MSAs for that new service.

174. We also amend Section 0.291, listing the authority delegated to the Chief, Common Carrier Bureau (Bureau), explicitly to delegate authority to issue Orders acting on petitions for pricing flexibility involving special access and dedicated transport services. Because the pricing flexibility triggers we adopt for those services are administratively simple bright-line tests, Bureau-level review is sufficient to determine whether the incumbent LEC has satisfied the applicable test.

175. Finally, a pricing flexibility petition for special access and dedicated transport services will be deemed granted unless the Bureau denies it within 90 days of the close of the pleading cycle, as the Commission proposed in the *Access Reform NPRM*.[429] Ameritech recommends adopting a deadline of 90 days after the filing date of the petition, rather than 90 days after the close of the pleading cycle.[430] Although we expect our pricing flexibility thresholds to be simple to administer, it is prudent to allow more time to review pricing flexibility petitions, at least until we gain more experience. The Bureau may, of course, issue an Order before this 90-day deadline if it has completed the review. Also, if experience shows that a full 90 days is not necessary to review pricing flexibility petitions, we may consider relaxing this or other procedural requirements. The period for filing applications for review begins the day the Bureau grants or denies the petition, or the day that the petition is deemed denied.

2. Treatment of Proprietary Data

176. In the event that a price cap LEC wishes to request confidential treatment of any information contained in a pricing flexibility petition, it should follow the procedures for obtaining confidential treatment of tariff cost support information. The price cap LEC must demonstrate, by a preponderance of the evidence, that the information should be withheld from public inspection in accordance with the requirements of Section 0.459 of the

[428] Specifically, price cap LECs are required to incorporate new services into a price cap basket in the annual access tariff filing effective between 6 and 18 months after the new service tariff takes effect. 47 C.F.R. § 61.42(g).

[429] *Access Reform NPRM*, 11 FCC Rcd at 21431.

[430] Ameritech Comments, Attachment N at 3, 5.

Commission's rules.[431] A price cap LEC wishing to request confidential treatment of information contained in a pricing flexibility petition should demonstrate, by a preponderance of the evidence, that the information should be withheld from public inspection in accordance with the requirements of Section 0.459 of this chapter.

177. In their requests for confidentiality, carriers should indicate with specificity the extent to which they believe the information they submit, such as the identity of collocators, is subject to section 222(b) of the Act concerning confidential carrier information,[432] and the bases for that belief. The information will be kept confidential, as appropriate, subject to Commission procedures concerning Freedom of Information Act (FOIA) requests. Although the Commission will consider any FOIA requests on a case-by-case basis, pursuant to applicable law, we note that FOIA exceptions, such as the exception for "trade secrets and commercial or financial information,"[433] may prevent disclosure of such information. A price cap LEC will be required, in any event: (1) to provide collocation information to parties to the extent that the parties are the collocators upon which the price cap LEC relies in its petition, (2) to certify in its petition that it has done so, and (3) to provide to the Commission a copy of the information it provides to those parties. In such cases, the LEC may provide the data to a party in redacted form, revealing to the party only the information relating to that party.

3. Other Switched Access Services

178. We will grant Phase I pricing flexibility for common line and traffic-sensitive services, and the traffic-sensitive components of tandem-switched transport service to a price cap LEC within an MSA if the LEC demonstrates that its competitors, in aggregate, offer service over their own facilities to at least 15 percent of incumbent LEC customer locations in the MSA. For the reasons we explain in Section VI.C.3, we do not prescribe a particular method by which a LEC may demonstrate satisfaction of this trigger. As a result, petitions seeking pricing flexibility for these services will not be as routine as petitions seeking pricing flexibility for special access and dedicated transport services. Because pricing flexibility petitions for common line, traffic-sensitive, and the traffic-sensitive components of tandem-switched transport services are not subject to a bright-line rule, and will require more fact-intensive investigation, they are best addressed at the Commission level. Accordingly, we do not delegate authority to the Bureau at this time to act on petitions for pricing flexibility involving these services. A pricing flexibility petition for these services will be deemed

[431] *See* 47 C.F.R. §§ 0.459. *See also* Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, CC Docket No. 96-55, Report and Order, 13 FCC Rcd 24816, 24840-42 (1998) (*Treatment of Confidential Information Order*); *Tariff Streamlining Order*, 12 FCC Rcd at 2212-14.

[432] *See* 47 U.S.C. § 222(b).

[433] *See* 5 U.S.C. § 552(b)(4).

granted unless the Commission denies it within five months of the close of the pleading cycle for that petition. Otherwise, we adopt the same procedural requirements for pricing flexibility petitions for these services as we adopt above for pricing flexibility petitions for special access and dedicated transport services. As the Commission gains experience with such petitions, it may be possible for the Commission to act in less than the full five months, or to delegate authority to the Bureau with respect to these petitions.

F. U S West Forbearance Petition

179. As we note above, several BOCs have filed petitions seeking forbearance, pursuant to section 160 of the Act,[434] from dominant carrier regulation in the provision of certain special access and high capacity services.[435] The first of these petitions, filed by U S West, is deemed granted if not denied by the Commission by August 24, 1999, unless the Commission extends the deadline for an additional ninety days.[436] We conclude that such an extension is warranted here. In this Order, we adopt a comprehensive framework for granting price cap LECs such as U S West progressively greater pricing flexibility as competition develops, including much of the relief sought by U S West in its petition, and an extension of the deadline for acting on that petition will allow the Commission to consider U S West's request for relief in the context of the rules we adopt here. Accordingly, we extend the deadline for acting on U S West's petition by ninety days.

VII. CLEC ACCESS CHARGES

A. Background

180. In the *Competitive Carrier Proceeding*, the Commission established a comprehensive framework for determining whether carriers are dominant or non-dominant.[437] Dominant carriers[438] are carriers that possess individual market power and those without

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[434] 47 U.S.C. § 160.

[435] *See supra* Section II.C.1.

[436] *See* Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket No. 98-157 (filed Aug. 24, 1998); 47 U.S.C. § 160(c) (imposing one-year deadline for Commission action on forbearance petition; Commission may extend the deadline by 90 days if necessary to ensure compliance with the statutory forbearance criteria).

[437] *Dominant/Non-Dominant Order*, 12 FCC Rcd 15766.

[438] *Competitive Carrier First Report and Order*, 85 FCC 2d at 20-22; see also 47 C.F.R. § 61.3(o) (defining "dominant carrier").

market power are non-dominant carriers.[439] The Commission's policy since *Competitive Carrier* is that a carrier is non-dominant unless the Commission makes or has made a finding that it is dominant.[440] New entrants into the exchange access market, such as competitive local exchange carriers (CLECs),[441] have been presumptively classified as non-dominant because the Commission has not found that they are able to exercise market power in particular service areas.[442] To date, the Commission has applied Parts 61 (Tariffs) and 69 (Access Charges) of its rules only to incumbent LECs.[443]

181. In the *Access Reform NPRM*, the Commission sought comment on whether CLECs have market power with regard to terminating access services and whether and to what extent it should regulate terminating access services provided by CLECs.[444] The Commission noted that, with originating access, the calling party has the choice of service provider, the decision to place a call, and the ultimate obligation to pay for the call.[445] The calling party is also the customer of the IXC that purchases the originating access service.[446] As long as IXCs can influence the choice of the access provider, a LEC's ability to charge

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[439] The Commission, in the *Dominant/Non-Dominant Order*, listed a number of factors that historically have been considered in determining whether a firm possesses market power, including market share, supply and demand substitutability, the cost structure, size, and resources of the firm, and control of bottleneck facilities. *See Dominant/Non-Dominant Order*, 12 FCC Rcd at 15766. *See also* Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 94-149, Notice of Proposed Rulemaking, 11 FCC Rcd 18877, at 18929-38 (1996).

[440] *See, e.g., Competitive Carrier First Report and Order*, 85 FCC 2d at 10-11; 47 C.F.R. § 61.3(u) (defining "non-dominant carrier").

[441] CLECs compete with incumbent LECs in the provision of local exchange and exchange access services.

[442] See Tariff Filing Requirements for Non-Dominant Common Carriers, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754 (1993) (CLECs are non-dominant carriers because they have not been previously declared dominant), *vacated and remanded in part on other grounds*, Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995); *on remand*, 10 FCC Rcd 13653 (1995).

[443] *See* Hyperion Telecommunications, Inc., Petition for Forbearance, Memorandum Opinion and Order, 12 FCC Rcd 8596 (1997) (granting petitions seeking permissive detariffing for provision of interstate exchange access services by providers other than the incumbent LEC) (*Hyperion Order*). Concomitantly with the *Hyperion Order*, the Commission issued a Notice of Proposed Rulemaking seeking comment on mandatory detariffing for non-incumbent LEC providers of interstate exchange access services. *See* Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers, CC Docket No. 97-146, Notice of Proposed Rulemaking, 12 FCC Rcd 8613 (1997).

[444] *Access Reform NPRM*, 11 FCC Rcd at 21476.

[445] *Id.* at 21472.

[446] *Id.*

excessive originating access rates is limited, as IXCs will shift their traffic from that carrier to a competing access provider.[447] The Commission noted that, with terminating access, the choice of service provider for terminating access is made by the called party.[448] The decision to place the call and payment for the call lies, however, with the calling party. The calling party, or its long-distance service provider, has little or no ability to influence the called party's choice of service provider.[449] Furthermore, IXCs are required by statute to charge averaged rates.[450] Consequently, not only does the calling party not choose the terminating LEC, but section 254(g) requires IXCs to spread the cost of terminating access rates among all end users. Because the paying party does not choose the carrier that terminates its interstate calls, CLECs may have incentive to charge excessive rates for terminating access.[451] Accordingly, the Commission tentatively concluded in the *Access Reform NPRM* that terminating access may remain a bottleneck controlled by whichever LEC provides terminating access to a particular customer, even if competitors have entered the market.[452] The Commission also recognized, however, that excessive terminating access charges might encourage IXCs to enter the access market in order to avoid paying these charges.[453]

182. In the *Access Reform NPRM*, the Commission also sought comment on whether it should continue to treat incumbent LEC originating "open end" minutes, such as originating access for 800 service, as terminating minutes for access charge purposes, and whether it should extend this approach to CLECs.[454] The Commission noted that, in some cases, such as

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[447] *Id.*

[448] *Id.* at 21476.

[449] *Id.*

[450] *See* 47 U.S.C. § 254(g); *see also* Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564 (1996) (requiring IXCs to integrate and average the rates they charge for service).

[451] *Access Reform NPRM*, 11 FCC Rcd at 21476 (citing JOSEPH GILLAN & PETER ROHRBACH, THE POTENTIAL IMPACT OF LOCAL COMPETITION ON TELECOMMUNICATIONS MARKET STRUCTURE: DIVERSITY OR RECONCENTRATION, 1994; ROBERT W. CRANDALL AND LEONARD WAVERMAN, TALK IS CHEAP: THE PROMISE OF REGULATORY REFORM IN NORTH AMERICAN TELECOMMUNICATIONS, 1996, at 265-265).

[452] *Access Reform NPRM*, 11 FCC Rcd at 21476.

[453] *Id.* at 21473.

[454] *See id.* at 21477. "The term open end of a call describes the origination or termination of a call that utilizes exchange carrier common line plant (a call can have no, one, or two open ends.") 47 C.F.R. § 69.105(b)(1)(ii).

800 and 888 service, the called party, which pays for the call, is unable to influence the calling party's choice of provider for originating access services.[455]

183. In the *Access Reform First Report and Order*, the Commission decided not to adopt any regulations governing CLEC terminating access charges and did not address the issue of CLEC originating access charges.[456] Based on the available record, the Commission decided to continue to treat non-incumbent LECs as non-dominant in the provision of terminating access service.[457] Although an IXC must use the CLEC serving an end user to terminate a call, the Commission found that the record did not indicate that CLECs previously had charged excessive terminating access rates or that CLECs distinguished between originating and terminating access in their service offerings.[458] The Commission concluded that it did not appear that CLECs had structured their service offerings in ways designed to exercise any market power over terminating access and that, therefore, the concerns expressed in the *Access Reform NPRM* were not substantiated by the record.

184. The Commission further observed that, as CLECs attempt to expand their market presence, the rates of incumbent LECs or other potential competitors should constrain the CLECs' terminating access rates.[459] In addition, the Commission found that overcharges for terminating access could encourage access customers to take competitive steps to avoid paying unreasonable terminating access charges.[460] The Commission explained that, although high terminating access charges may not create a *disincentive* for the call recipient to retain its local carrier (because the call recipient does not pay the long distance charge), the call recipient may nevertheless respond to *incentives* offered by an IXC with an economic interest in encouraging the end user to switch to another local carrier.[461] Thus, the Commission

[455] *See Access Reform NPRM*, 11 FCC Rcd at 21477.

[456] With respect to incumbent LEC originating access charges, the Commission concluded that new entrants, by purchasing unbundled network elements or providing facilities-based competition, eventually will exert downward pressure on incumbent LEC originating access rates. *Access Reform First Report and Order*, 12 FCC Rcd at 16135-36.

[457] *Access Reform First Report and Order*, 12 FCC Rcd at 16140.

[458] *Id.* The Commission noted, in fact, that the record indicated that the terminating rates of CLECs were equal to or below the tariffed rates of incumbent LECs. *Id.*

[459] The Commission stated that the record indicated that long-distance carriers have established relationships with incumbent LECs for the provision of access services, and new market entrants are not likely to risk damaging their developing relationships with IXCs by charging unreasonable terminating access rates. *Id.*

[460] *Id.*

[461] *Id.* at 16141.

concluded that the possibility of competitive responses by IXCs would constrain non-incumbent LEC pricing.[462]

185. Although the Commission declined at that time to adopt any regulations governing the provision of terminating access provided by CLECs because CLECs did not appear to possess market power,[463] it noted that it could address the reasonableness of CLEC terminating access rates in individual instances through the exercise of its authority to investigate and adjudicate complaints under section 208.[464] Moreover, the Commission stated that it would be sensitive to indications that the terminating access rates of CLECs were unreasonable.[465] The Commission committed to revisit the issue of CLEC access rates if there were sufficient indications that CLECs were imposing unreasonable terminating access charges.[466]

B. AT&T's Petition for Declaratory Ruling

186. On October 23, 1998, AT&T filed a petition requesting that the Commission issue a declaratory ruling[467] confirming that, under existing law and Commission rules and policies, IXCs may elect not to purchase switched access services offered under tariff by CLECs.[468] AT&T contends that a substantial number of CLECs impose switched access charges that are significantly higher -- in some cases, by more than twenty times -- than those

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[462] *Id.* at 16142. The Commission also decided to continue to treat "open end" originating minutes, such as those for 800 or 888 services, as terminating minutes for access charge purposes, recognizing, in these cases, that access customers have limited ability to influence the calling party's choice of access provider. *Id.* In order to address the potential that incumbent LECs might charge unreasonable rates for terminating access, the Commission limited price cap incumbent LEC recovery of TIC and common costs from terminating access rates for a limited period with the eventual elimination of any recovery of common line and TIC costs through terminating access charges. *Id.* at 16137.

[463] *Id.* at 16141.

[464] 47 U.S.C. § 208.

[465] *Access Reform First Report and Order*, 12 FCC Rcd at 16141-42. The Commission indicated that terminating access rates that exceed originating rates in the same market, for example, may suggest the need to revisit its regulatory approach. Similarly, the Commission noted that terminating rates that exceed those charged by the incumbent LEC serving the same market may suggest that a CLEC's terminating access rates are excessive. *Id.* at 16142.

[466] *Id.*

[467] *See* 47 C.F.R. § 1.2.

[468] *See AT&T Declaratory Ruling Petition.* We note that, unless otherwise indicated, all citations to comments and replies in this section of the Order refer to comments and replies submitted in response to the *AT&T Declaratory Ruling Petition.*

charged by the incumbent LEC against which the CLEC competes.[469] AT&T's attempts to negotiate a resolution of this issue have stalled, it says, because many CLECs take the position that, due to the "filed tariff doctrine,"[470] AT&T is obligated to accept services from the CLEC at prices chosen by the CLEC, even though AT&T did not affirmatively order access from the CLEC.[471] AT&T alleges that its petition is consistent with the *Access Reform First Report and Order*, in which the Commission stated that "terminating rates that exceed those charged by the ILEC serving the same market may suggest that a CLEC's terminating access rates are excessive."[472]

187. The Commission has the discretion, on a case-by-case basis, to determine whether it is best to resolve a controversy by the adoption of a general rule or by an individual ad hoc proceeding, such as a declaratory ruling.[473] The presence or absence of factual disputes is a significant factor in deciding whether a declaratory ruling is an appropriate method for resolving a controversy.[474] AT&T contends that a declaratory ruling is

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[469] *AT&T Declaratory Ruling Petition*, Appendix A. We note that this issue is also the subject of the Common Carrier Bureau's (Bureau) decision in MGC Communications, Inc. v. AT&T Corp., File No. EAD 99-002, Memorandum Opinion and Order, DA 99-1395 (Com. Car. Bur. July 16, 1999) (*MGC Communications*).

[470] In general, the "filed tariff" or "filed rate" doctrine stands for the principle that "the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext . . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed." Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 127 (1990) (quoting Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94 (1915)). The filed tariff doctrine is codified at 47 U.S.C. § 203, which requires all common carriers of interstate and foreign telecommunications to file a schedule of their charges, as well as the classifications, practices, and regulations affecting such charges. A carrier may charge only the rates listed in the tariff. 47 U.S.C. § 203(c)(1). The charges, classifications, regulations or practices in the filed tariff may be changed only after notice is given to the Commission and the public. 47 C.F.R. § 203(b)(1). See also Cincinnati Bell Telephone v. Allent Communication Services, 17 F.3d 921, n.4 (6th Cir. 1994).

[471] *AT&T Declaratory Ruling Petition* at 3, n.2. AT&T does not typically place access orders, or establish direct connections, with such CLECs. Id. Instead, the CLEC establishes an interconnection arrangement with the incumbent LEC serving the area, and it installs trunks to the incumbent LEC's access tandem. *Id.* Calls originated from the CLEC's switch are routed to the incumbent LEC tandem, which then combines them with other traffic destined for AT&T or another IXC's network and routes that traffic to that IXC's POP. *Id.* Terminating traffic from AT&T and other IXCs similarly is routed through the incumbent LEC access tandem to the CLEC. *Id.*

[472] *Id.* at 9 (citing *Access Reform First Report and Order*, 12 FCC Rcd at 16135-42).

[473] *See, e.g.*, British Caledonian Airways Ltd. v. Civil Aeronautics Board, 584 F.2d 982, 993 (1978) (the choice made between proceeding by a general rule or by an individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency) (*British Caledonian Airways Ltd.*).

[474] American Network, Inc. Petition for Declaratory Ruling Concerning Backbilling of Access Charges, Memorandum Opinion and Order, 4 FCC Rcd 550, 551 (Com. Car. Bur. 1989), *recon. denied*, 4 FCC Rcd 8797 (Com. Car. Bur. 1989). We note that the factors for determining the propriety of a declaratory ruling are

appropriate here because the "facts are essentially undisputed and the governing law is clear."[475] Despite AT&T's allegations to the contrary, however, the facts are not undisputed here. A number of carriers assert that AT&T's calculations of CLEC originating and terminating access rates[476] are either incorrect or misleading.[477] In response to these assertions, AT&T addressed only one of the concerns raised by commenters.[478] Without agreement by the parties on the calculation and accuracy of both the incumbent LEC and CLEC rates, it is impossible compare them.[479] Nor can the Commission evaluate AT&T's claim that its request for declaratory ruling is consistent with the Commission's statements in the *Access Reform First Report and Order* that CLEC terminating access rates that exceed those of the incumbent LEC may be excessive.[480]

188. Moreover, the parties also dispute the applicable law. A number of opponents to AT&T's petition assert that AT&T mistakenly relies upon the *Capital Network* decision, in

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different in the context of a court referral under the primary jurisdiction doctrine. *See* Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) (creating "primary jurisdiction" doctrine); United States v. Western Pacific R.R., 352 U.S. 59, 63-70 (1956) (explaining purpose of the doctrine); Far East Conference v. United States, 342 U.S. 570, 574 (1952) (same); MCI Communications Corp. v. AT&T, 496 F.2d 214, 220-22 (3d Cir. 1974) (applying the doctrine in the telecommunications context)).

[475] *AT&T Declaratory Ruling Petition* at 5.

[476] *See id.* at Appendix A.

[477] *See* WinStar Comments at 6; Optel Comments at 5; CTSI Comments at 10 (rates attributed to WinStar, Optel, and CTSI, respectively, are incorrect); ALLTEL Comments at 2 and ALTS Comments at 6 (AT&T's rate comparison is misleading because it does not reflect the fact that price cap carriers rates are reduced as a result of the introduction of presubscribed interexchange carrier charge); Teligent, Inc. Comments at 9 (AT&T fails to include an amount for transport in the rates charged by Ameritech, the local incumbent LEC, but does include an amount for transport in Teligent's rates).

[478] AT&T states that inclusion of the presubscribed interexchange carrier charge (PICC) would not make a material difference to its calculation, but it does not address the carriers' other concerns regarding AT&T's calculations, i.e., that rates were misquoted and did not include incumbent LEC transport charges. *See* AT&T Reply at 4, n.10, and Appendix B, providing a recomputed comparison including the PICC.

[479] In its reply, AT&T argues that its petition is not a dispute over rate calculations because it is not limited to CLECs that charge rates exceeding the corresponding ILEC levels, but also applies to CLECs that charge rates that simply mirror incumbent LEC rates. AT&T Reply at 4. AT&T asserts that both rates that exceed and rates that mirror incumbent LEC rates distort the exchange access market by establishing the incumbent LECs' purportedly above-cost charges as a benchmark for CLECs. We do not find this argument convincing. At the heart of either complaint is the fact that AT&T views itself as a captive customer forced to pay excessively high terminating rates. In order to evaluate such a complaint, all parties must agree on the method of calculating the disputed rate, *e.g.*, whether transport fees and PICCs are included. Based on the record, it appears that the parties do not.

[480] *AT&T Declaratory Ruling Petition* at 9 (citing *Access Reform First Report and Order*, 12 FCC Rcd at 1635-42).

which the Commission found that an attempt to charge a party for a service that the party did not order would constitute an unreasonable practice within the meaning of section 201(b) of the Act, 47 U.S.C. § 201(b).[481] These opponents assert that AT&T failed to address the application of the constructive ordering doctrine, established in *United Artists*.[482] In *United Artists*, the Commission found that affirmative consent was unnecessary to create a carrier-customer relationship when a carrier is interconnected with other carriers in such a manner that it can expect to receive access services, and when it fails to take reasonable steps to prevent the receipt of access services and does in fact receive such services.[483] For all the foregoing reasons, and in the exercise of our discretion, we decline to address AT&T's concerns regarding CLEC access charges through a declaratory ruling.[484] We therefore deny AT&T's petition.

189. In the *Access Reform First Report and Order*, however, the Commission committed to review the issue of CLEC access charges if there were evidence that CLECs were imposing unreasonable terminating access charges.[485] The *AT&T Petition for Declaratory Ruling*, the comments provided in support of it,[486] and the Bureau's recent decision in *MGC Communications*[487] suggest the need to revisit the issue of CLEC access

[481] *AT&T Declaratory Ruling Petition* at 6-8 (citing Capital Network Systems, Inc., 6 FCC Rcd 5609 (Com. Car. Bur. 1992), *application for review denied*, 7 FCC Rcd 80921 (1992), *aff'd*, Capital Network Systems, Inc. v. FCC, 28 F.3d 201 (D.C. Cir. 1994) (*Capital Network*)).

[482] *See* TRA Comments at 5; MGC Communications Comments at 13; MCI Comments at 4; Cablevision Lightpath, Inc. and Nextlink, Inc. Comments at 3. *See also* United Artists Payphone Corp. v. New York Tel. Co., 8 FCC Rcd 5562 (1993) (*United Artists*).

[483] *United Artists*, 8 FCC Rcd at 5565-66. *See also Capital Network*, 28 F.3d. at 204 (taking notice of the principle of constructive ordering, but finding that the principle does not apply to the billing of incomplete calls).

[484] *See* SBC Comments at 6-7 (requesting that the Commission issue a notice of proposed rulemaking for further comment before deciding the matter because the decision may affect other parties and practices). We note that several parties have raised a number of other substantive objections to AT&T's petition that we need not consider because we are denying the petition on procedural grounds. *See, e.g.*, BellSouth Comments at 3; Total Telecommunication Services Comments at 4-10; MGC Communications Comments at 5; CTSI Comments at 2 (AT&T's petition violates the interconnection policies of Telecommunications Act of 1996).

[485] *Access Reform First Report and Order*, 12 FCC Rcd at 16141-42.

[486] *See AT&T Declaratory Ruling Petition*; Cable & Wireless Comments at 1; U S West Comments at 1; Sprint Comments at 1.

[487] *MGC Communications*, File No. EAD 99-002, Memorandum Opinion and Order, DA 99-1395.

rates.[488] Accordingly, in the accompanying Notice, we initiate a rulemaking to examine CLEC originating and terminating access rates.[489]

VIII. NOTICE OF PROPOSED RULEMAKING

A. Geographic Deaveraging for Switched Access Services

190. In this section, we seek comment on whether to amend our Part 69 rules to permit price cap incumbent LECs to deaverage interstate common line and traffic-sensitive access charges within study areas without a competitive showing. Currently, Section 69.3(e)(7) of our rules requires an incumbent LEC to charges rates for access elements that are averaged across each of its study areas.[490]

191. *Common Line Basket.* In the *Access Reform NPRM*, the Commission requested comment on deaveraging all interstate access rate elements except for the subscriber line charge (SLC) (and the primary interexchange carrier charge (PICC), which did not exist at the time).[491] At that time, however, the Commission proposed to permit deaveraging only upon a showing of the degree to which local markets are open to competition.[492] We now seek comment on whether to permit incumbent LECs to deaverage common line access elements without a competitive showing. To the extent that parties advocate conditioning deaveraging

[488] Although we are initiating a rulemaking into the issue of CLEC access charges, we take no position on the reasonableness of these charges at this time. We merely wish to reexamine the issue in light of the arguments filed both in support of and in opposition to the *AT&T Declaratory Ruling Petition*. For example, the comments opposing AT&T's Petition argue that CLECs may have justifiably higher access charges due to their limited geographical scope and scale and their different cost structures.

[489] *See, e.g., British Caledonian Airways Ltd.*, 584 F.2d at 993.

[490] 47 C.F.R. § 69.3(e)(7). A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers operating in more than one state typically have one study area for each state, and carriers operating in a single state typically have a single study area. Carriers perform jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission adopted a rule freezing study area boundaries effective November 15, 1984. Part 36 of the Commission's Rules, 47 C.F.R., Part 36, Appendix-Glossary, definition of "Study Area." *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984), adopted by the Commission, 50 Fed. Reg. 939 (Jan. 8, 1985). Section 69.123 permits incumbents to deaverage rates for services in the trunking basket except for the transport interconnection charge (TIC). In Section V, *supra*, we grant incumbent LECs greater flexibility to deaverage rates for these services.

[491] *Access Reform NPRM*, 11 FCC Rcd at 21433.

[492] For further discussion and analysis of this proposal, *see* Section VI.C.1, *supra*.

upon satisfaction of a competitive showing, we seek comment on the appropriate showing and the procedure by which evidence should be presented and evaluated.[493]

192. We also seek comment on whether to condition an incumbent LEC's authority to deaverage common line access elements on certain regulatory developments, such as deaveraging of unbundled network elements in accordance with our rules,[494] or establishment of explicit universal service high cost support mechanisms, and, if so, how. Should we impose these conditions in addition to any competitive showing that we may require? We note that, where unbundled network elements are deaveraged, continuing to require incumbents to charge access rates that are averaged across the study area may foreclose the incumbent LEC from meeting competition from unbundled network elements in low-cost areas. Similarly, an incumbent LEC's averaged rates will be below that LEC's cost in high-cost areas, thus discouraging competitive entry in those areas. We also seek comment on whether incumbent LECs should be required, as opposed to merely permitted, to deaverage certain or all common line access rate elements based on any conditions, such as the deaveraging of unbundled network element rates in a state.

193. Currently, incumbent LECs recover interstate common line costs through the SLC, PICC, and carrier common line charge (CCLC). The SLC and PICC are flat-rated charges that vary by class of customer, *e.g.*, multi-line business, single-line business, primary residential line, and additional residential lines, subject to various caps.[495] The CCLC is a per-minute charge that does not vary by class of customer.[496] The SLC is assessed directly on end users while the PICC and CCLC are assessed on IXCs. Incumbent LECs are required to recover their interstate-allocated common line costs first through SLCs (subject to caps), then from PICCs (again, subject to caps), and finally from the CCLC. As the SLC and PICC caps rise,[497] the CCLC gradually decreases and will someday be eliminated.

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[493] We note that, if we permit incumbent LECs to deaverage common line and/or traffic-sensitive charges, IXCs may face significantly differing access costs within LEC study areas. This may increase pressure on IXCs to deaverage interstate interexchange service rates in a manner that conflicts with section 254(g) of the Act, which requires IXCs to charge subscribers in rural and high cost areas rates no higher than rates charged to subscribers in urban areas and to charge subscribers in each state rates no higher than rates charged in any other state. 47 U.S.C. § 254(g). *See also* MCI Oct. 26 Comments at 32.

[494] *See* 47 C.F.R. § 51.507(f) (requiring states to deaverage UNEs across at least three geographic zones); ALTS Oct. 26 Comments at 9. We recently issued a *sua sponte* stay of Section 51.507(f) that will remain in effect until six months after the Commission issues its order in CC Docket No. 96-45, finalizing and ordering implementation of high-cost universal service support for non-rural local exchange carriers under section 254 of the Act. *See* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC No. 99-86, Stay Order (rel. May 7, 1999).

[495] 47 C.F.R. §§ 69.152, 69.153.

[496] 47 C.F.R. § 69.154.

[497] *See* 47 C.F.R. §§ 69.152(k), 69.153.

194. Parties supporting the deaveraging of interstate common line access charges should comment on the appropriate means of distributing deaveraged cost recovery among such charges. We request comment on whether any deaveraging of the SLC and PICC should be subject to current caps on those charges. At present, our rules provide that, to the extent the SLC caps on all lines and the PICC ceilings on primary residential and single-line business (SLB) lines prevent recovery of the full common line revenues permitted by our price cap rules, incumbent LECs may recover the shortfall through non-primary residential (NPR) and multi-line business (MLB) PICCs.[498] Thus, if primary residential and SLB SLCs and PICCs have reached their caps, NPR and MLB PICCs may be funding at least part of this shortfall, *i.e.*, subsidizing residential and SLB PICCs. This subsidy will decrease over time as the caps on the primary-residential and single-line business SLCs rise. To what degree should we condition deaveraging of common line rate elements on developments such as the elimination of the MLB PICC? What constraints, if any, should we place on the means by which certain foregone revenue may be recovered? For example, should we permit deaveraging only within a customer class and for a particular type of charge, *e.g.*, prohibit incumbent LECs from recovering foregone SLC revenue through the CCLC or prohibit incumbent LECs from raising the NPR SLC to fund lower MLB SLCs?

195. Further, we seek comment on the means of recognizing any geographic variation in common line costs, *i.e.*, methods of defining geographic pricing zones. Many states have defined at least three geographic zones for the pricing of unbundled loops pursuant to section 252(d)(1) of the Act.[499] Universal service reform also may require defining zones to reflect different cost characteristics.[500] We seek comment on whether geographic pricing zones for common line charges should be based on UNE or universal service zones or, perhaps, trunking basket service zones.[501] Parties are invited to suggest additional bases for

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[498] 47 C.F.R. § 69.153(d).

[499] *See, e.g.*, Consolidated Petition of AT&T Communications, Inc., and MCI Telecomms. Corp. and Affiliates for Arbitration with Southwestern Bell Tel. Co., Case Nos. TO-97-40 and TO-97-67, at 35-36 (Mo. P.S.C. Dec. 11, 1996); Petition of AT&T Communications, Inc. for Arbitration with GTE Hawaiian Tel. Co., Docket No. 96-0329, Decision No. 15528 at 36 (Haw. P.U.C. Apr. 18, 1997). Section 51.507(f) requires states to create at least three geographic rate zones for unbundled network elements. 47 C.F.R. § 51.507(f). We note that despite the fact that Section 51.507(f) of our rules was ineffective when most states determined whether to deaverage geographically unbundled network element rates, many states, such as those listed here, chose to do so.

[500] Federal-State Joint Board on Universal Service, CC Docket 96-45, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, CC Docket No. 97-160, Access Charge Reform, CC Docket No. 96-262, Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45 and Fourth Report & Order in CC Docket No. 96-262, 14 FCC Rcd 8078, 8126-30 (1999) (*Universal Service Seventh Report and Order*).

[501] *See, e.g., id.* We relax our rules concerning zone pricing of trunking basket services in Section V, *supra.*

establishing geographic zones. For example, should we require LECs to establish identical geographic pricing zones for all access elements?

196. We seek comment on whether to permit incumbent LECs to define their own zones. If so, should we place any constraints on incumbent LEC zone pricing plans for common line service? For example, must an incumbent LEC demonstrate that such zones are based on cost? If so, how? Should there be a limit on the number or size of such zones? We note, for example, that in the accompanying Order we grant incumbent LECs greater flexibility to deaverage rates for services in the trunking basket, but we require each zone, except the highest-cost zone, to account for at least 15 percent of the incumbent's trunking basket revenues in the study area.[502]

197. In addition, we seek comment on the procedures by which the Commission might permit incumbent LECs to define common line access charge zones. Should we require parties to submit for prior approval such zone pricing plans in advance of tariff filings, as we initially required for special access and switched transport zone pricing plans?[503] If so, what information should we require parties to submit?

198. We also seek comment on whether the use of different zones for unbundled network elements, universal service, and access charges would create inefficiencies and arbitrage opportunities.[504] We seek comment on alternative approaches for ensuring that the zones for these different purposes are compatible and that geographic zones generally reflect cost differences.[505]

199. *Traffic-sensitive basket.* The traffic-sensitive basket includes local switching, information, data base access services, billing name and address, local switching trunk ports, and signaling transfer point port termination.[506] In the past, parties have argued that traffic-sensitive service costs vary little, if at all, within study areas.[507] Furthermore, we are unaware of any state commission that has deaveraged an incumbent LEC's rates for unbundled local switching. We invite parties to submit further evidence regarding the degree to which costs of traffic-sensitive services may vary geographically within incumbent LEC

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[502] *See* Section V, *supra*. We adopt that requirement to ensure that incumbent LECs cannot define zones that are, for all practical purposes, specific to particular customers.

[503] *See, e.g., Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7456-57.

[504] *See Universal Service Seventh Report and Order*, 14 FCC Rcd at 8128-29.

[505] For example, different geographic zones may work for these purposes so long as the results are not widely disparate in any particular location.

[506] 47 C.F.R. § 61.42(e)(2).

[507] *See, e.g.*, MCI Nov. 5 Reply Comments at 31-32, 36-37; Time Warner Oct. 26 Comments at 14.

study areas and whether any such variance warrants permitting incumbent LECs to deaverage traffic-sensitive charges. We seek comment on whether we should establish similar or identical rules concerning any deaveraging of traffic-sensitive elements as we may establish for common line elements. For example, should we establish similar or identical rules regarding the methods and procedures for establishing rate zones for traffic-sensitive services, to the extent that they should differ from common line or transport zones? In Section VIII.C, *infra*, we seek comment on replacing the existing per-minute or per-call local switching rate structure rules with a capacity-based rate structure. How might deaveraging of traffic-sensitive charges be affected by such changes in the switching rate structure?

B. Phase II Pricing Flexibility for Switched Service

200. In this section, we seek comment on Phase II pricing flexibility for common line and traffic-sensitive services, and the traffic-sensitive components of tandem-switched transport services offered by price cap incumbent LECs.[508] We seek comment on the appropriate triggers for such relief and how Phase II relief for common line and traffic-sensitive services might differ from Phase II relief for dedicated transport and special access services that we establish in the Order accompanying this Notice.[509]

1. Triggers

201. As we discuss in the Order, Phase II relief is warranted when an incumbent LEC demonstrates that competitors have established a significant market presence, *i.e.*, that competition for a particular service within a geographic area is sufficient to preclude the incumbent from exploiting any monopoly power over a sustained period.[510] In the Order, we conclude that an incumbent price cap LEC is entitled to Phase I pricing flexibility for common line and traffic-sensitive services in an MSA when it demonstrates that competitors, in aggregate, offer service over their own facilities to at least 15 percent of incumbent LEC customer locations in the MSA.[511] We seek comment on whether we should predicate Phase II relief for these services on a similar showing that competitors offer these services over their own facilities but adopt a threshold higher than 15 percent, and, if so, what this threshold

[508] As in our discussion of Phase I triggers for common line service, traffic-sensitive service, and traffic-sensitive components of tandem-switched transport service in Section VI.C.3, *supra*, references to "traffic-sensitive service" in this section include the traffic-sensitive components of tandem-switched transport service. The elements of tandem-switched transport are discussed in Section VI.C.3, *supra*. *See also* 47 C.F.R. § 69.111. We address Phase II pricing flexibility for the dedicated portion of tandem switched transport in Section VI.C.2, *supra*.

[509] *See* Section VI.C.5.c, *supra*.

[510] *See* Section VI.C.5, *supra*.

[511] *See* Section VI.C.3, *supra*.

should be. If a different approach is warranted for Phase II relief, what should the relevant test(s) be?

202. In the Order, we decline to include customer locations served by mobile wireless competitors toward satisfaction of the Phase I trigger, due to the administrative burdens of determining when mobile wireless serves as a substitute for incumbent LEC wireline service.[512] Should we exclude mobile wireless service from the Phase II trigger, as well? Are there reasons to believe that mobile wireless substitution will be easier or more important to measure in the context of requests for Phase II relief?

203. Some parties, such as Bell Atlantic and USTA, have proposed that we allow incumbent LECs to seek pricing flexibility for these services with respect to certain classes of customer, such as multi-line business customers, based on meeting triggers applicable only to a particular class of customers.[513] We conclude, above, that we should not allow such separate showings for Phase I relief because we wish to encourage competition for both high-volume business customers and residential and low-volume business customers.[514] Should we decline to permit such separate showings for Phase II pricing flexibility for common line and traffic-sensitive services?

2. Relief

204. In the Order, we conclude that an incumbent LEC that qualifies for Phase II relief for dedicated transport and special access services need not comply with Part 69 rate structure rules with respect to these services, may remove these services from price caps, and may file tariffs for these services on one day's notice (so long as such tariffs are made generally available).[515] Should we grant similar Phase II relief for common line and traffic-sensitive service? If not, what relief is warranted upon satisfaction of the Phase II triggers for these services?

205. We also seek comment on whether we should impose certain safeguards with respect to Phase II relief for common line and traffic-sensitive services that we do not impose with respect to dedicated transport and special access services. Currently, incumbent LECs recover some of their common line costs through the SLC, which is assessed directly on the end user. As a condition of granting Phase II relief for common line services, should we require price cap incumbent LECs to charge some or all of the common line charge directly to the end user? If only some of the costs should be charged directly to the end user, on

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[512] *See id.*

[513] Bell Atlantic *ex parte* statement of April 27, 1998, at 27; USTA *ex parte* statement of June 1, 1999, at 2.

[514] *See* Section VI.C.3, *supra*.

[515] *See* Section VI.C.4.c, *supra*.

what basis should we establish a limit? What are the advantages and disadvantages of prohibiting some or all common line cost recovery from IXCs? What additional safeguards might we require? For example, should we limit in any way the extent to which incumbent LECs recover local switching costs from IXCs, as opposed to end users?

206. We also seek comment on the relationship between granting price cap LECs Phase II pricing flexibility for common line and traffic-sensitive services and their receipt of universal service support with respect to these services. If, for example, a price cap LEC is entitled to universal service support for a line if its costs[516] exceed a particular benchmark, should we prohibit the LEC from charging a rate above that benchmark? Similarly, if eligibility for high cost support were determined on the basis of a revenue benchmark, should common line charges be limited by that benchmark? In what other ways should Phase II pricing flexibility for common line and traffic sensitive-services be affected or limited by universal service concerns?

C. Switching Issues

1. Local Switching

a. Introduction

207. We solicit comment on replacing the existing per-minute or per-call local switching rate structure rules with a capacity-based rate structure.[517] Specifically, should we require price cap LECs to charge for local switching on the basis of the number of trunks connected to a given end office switch? Below, we seek comment on a capacity-based local switching rate structure. We then consider adding a factor to the traffic-sensitive PCI formula, designed to serve a function similar to the "g" factor in the common line PCI formula, in order to give access customers a reasonable portion of the benefits of demand growth. Finally, we seek comment on whether to require LECs to decrease their traffic-sensitive PCIs, so that LECs would not retain the benefits of past demand growth on a going-forward basis.

[516] Cost could be determined in a number of ways, including, but not limited to, costs associated with a particular line or a price cap LEC's average cost per line in a study area. *See, e.g., Universal Service Seventh Report and Order*, 14 FCC Rcd at 8126-30.

[517] We address tandem switching issues later in this Order. We do not consider revising Section 69.125, the rate structure rules for dedicated signalling transport services, or Section 69.129, the rate structure rules for signalling for tandem switching. We reviewed our SS7 signalling rate structure rules in the *Access Reform First Report and Order*, 12 FCC Rcd at 16089-91, and we see no reason to re-open those issues at this time.

b. Background

208. The Commission's long-standing policy is to require, to the extent possible, rate structures to reflect the manner in which carriers incur costs. Inefficient rate structures lead to inefficient and undesirable economic behavior, and create an implicit subsidy between high-volume users and low-volume users.[518] For example, a rate structure that recovers non-traffic-sensitive costs through traffic-sensitive access rates increases the per-minute rates paid by IXCs and long-distance companies, thereby artificially suppressing demand for interstate long-distance services, and requiring high-volume customers to pay charges in excess of the costs of providing their service. Meanwhile, low-volume customers pay rates that are less than the cost of the dedicated equipment.[519]

209. The Part 69 rules require incumbent LECs to charge per-minute rates for local switching,[520] based on the Commission's 1983 finding that local switching services were traffic-sensitive.[521] In the *Access Reform First Report and Order*, the Commission recognized that the local switching costs associated with line cards and trunk ports are non-traffic-sensitive,[522] and revised the access charge rate structure to require incumbent LECs to recover those costs through non-traffic-sensitive rates.[523] The Commission also concluded that the record at that time was not adequate to determine whether or to what extent the remaining local switching costs were traffic-sensitive or non-traffic-sensitive, and maintained the requirement that LECs recover those costs through traffic-sensitive rates.[524] The Commission did, however, revise the local switching rate structure to permit, but not require, incumbent LECs to establish per-call local switching charges, in addition to per-minute rates.[525]

210. The Commission also considered the nature of switching costs in the *Local Competition Order*, in the context of establishing pricing rules for local switching unbundled

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[518] *Access Reform First Report and Order*, 12 FCC Rcd at 15995-96, 15998; Investigation of Interstate Access Tariff Non-Recurring Charges, CC Docket No. 85-166, Phase I, Part 3, 2 FCC Rcd 3498, 3501-02 (1987).

[519] *See Access Reform First Report and Order*, 12 FCC Rcd at 15996, 16008.

[520] *See, e.g.*, 47 C.F.R. § 69.106; *Access Charge Order*, 93 FCC 2d at 304 (1983) (*Access Charge Order*).

[521] *Access Charge Order*, 93 FCC 2d at 304-05.

[522] Line cards connect subscriber lines to the switch, and trunk ports connect interoffice trunks to the switch. *Access Reform First Report and Order*, 12 FCC Rcd at 16034.

[523] *Id.* at 16035-36.

[524] *Id.* at 16040.

[525] *Id.* at 16041-46.

network elements (UNEs). At least one party to that proceeding, the Washington Utilities and Transportation Commission, advocated a rate structure based on peak usage for local switching in 1996, arguing that a flat rate based upon the cost of providing capacity at peak load is possibly the most economically correct pricing mechanism.[526] In the *Local Competition Order*, the Commission concluded that shared local switching costs, *i.e.*, local switching costs other than the costs of line cards and trunk ports, could be reasonably recovered through either flat or per-minute rate structures, and permitted state public service commissions to adopt either traffic-sensitive or non-traffic-sensitive rate structures for local switching unbundled network elements (UNEs).[527]

c. Capacity-based Local Switching Rate Structure

211. If costs are driven by peak demand, as suggested by the Washington Utilities and Transportation Commission, then local switching costs do not vary directly with total switched minutes in most cases. In the *Access Reform First Report and Order*, however, the Commission considered and rejected a proposal to require incumbent LECs to develop peak and off-peak rates for local switching, because the Commission concluded that LECs would have difficulty determining peak and off-peak hours with any degree of certainty, due to geographic, user-type, and service considerations. In addition, charging different prices for calls made during different times of the day may cause customers to shift their calling to less expensive times, thereby resulting in different peak times.[528] We know of no reason to revisit our conclusion to reject peak and off-peak rates for local switching. Instead, we consider adopting a capacity-based local switching rate structure. If an increase in total minutes or total number of calls would lead to a measurable increase in local switching costs only when the increase at times of peak demand is so great as to require an expansion of switch capacity, then a capacity-based rate structure may reflect the manner in which incumbent LECs incur local switching costs better than the existing rate structure, without the difficulties raised by determining peak and off-peak hours.

212. A capacity-based local switching rate structure may offer other benefits. Most notably, if IXCs purchased a greater portion of their access services through non-traffic-sensitive rates, they would have an incentive to develop off-peak pricing plans to encourage long distance consumers to make more or longer off-peak calls. This, in turn, would encourage more efficient use of the public switched network. Such pricing plans are also likely to extend a greater share of the benefits of access cost reductions to residential long

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[526] *See* Washington Utilities and Transportation Commission Comments in CC Docket No. 96-98, at 29-30, *summarized in Local Competition Order*, 11 FCC Rcd at 15900.

[527] *Local Competition Order*, 11 FCC Rcd at 15878-79, 15905.

[528] *Access Reform First Report and Order*, 12 FCC Rcd at 16046-47. *See also* Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5042 (1996).

distance customers, because they are more likely than business customers to be off-peak users.

213. Accordingly, we seek comment on revising Section 69.106(f)(2) of the Commission's Rules to require price cap LECs to develop capacity-based local switching charges rather than per-minute charges. For example, should we require price cap LECs to calculate a capacity-based local switching charge by considering the aggregate number of trunks switched by the LEC? If local switching rates are based on number of trunk-side connections, how should we treat local switching access services with line-side connections, such as Feature Group A?[529]

214. We also invite comment on the level of detail that we should specify in our local switching rate structure rules. Specifically, should Section 69.106 require incumbent LECs to charge for local switching based on the DS-1 equivalent capacity of an access customer's trunks connected to a particular end office switch, so that the DS-3 charge would be 28 times the DS-1 charge? Should we instead establish some initial rate relationship between DS-1 and DS-3, as the Commission did for transport?[530] Is there some other rate structure we could prescribe that would better reflect how local switching costs vary with increases in peak demand that necessitate expansion of switch capacity? Alternatively, should we permit LECs to develop their own capacity-based local switching rate structures, and examine the reasonableness of those structures in the tariff review process?

215. We tentatively conclude that a capacity-based local switching rate structure, if it indeed reflects cost causation, would not artificially disadvantage smaller IXCs in the market for long distance services. As the Commission concluded in its decision to eliminate the unitary rate structure for tandem-switched transport, rules that protect small IXCs in competition with AT&T, or other large IXCs, are unnecessary because the long-distance market is competitive.[531] We seek comment on this conclusion.

216. In addition, we invite parties to comment on whether permitting volume and term discounts for switched access services, as we propose above, would exacerbate any negative impact for smaller IXCs. We invite comment on whether a resale market for local

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[529] For purposes of this Order, Feature Group A is line side access to telephone company end office switches with an associated seven digit telephone number for the customer's use in originating communications from and terminating communications to an IXC's interstate service or a customer-provided interstate communications capability. *See* Contel of Indiana, Inc., Memorandum Opinion and Order, 3 FCC Rcd 4298, 4303 n.5 (Com. Car. Bur., 1988) (*citing* Exchange Carrier Association Tariff F.C.C. No. 1, pp. 157-59).

[530] The Commission adopted a presumption of reasonableness for initial transport rates if incumbent LECs developed DS-3 and DS-1 rates with a ratio of 9.6-to-1. *See* 47 C.F.R. § 69.108, Transport Rate Structure and Pricing, CC Docket No. 91-213, First Reconsideration Order, 8 FCC Rcd 5370 (1993).

[531] *Access Reform First Report and Order*, 12 FCC Rcd at 16060.

switching services is likely to develop, and whether such a development would mitigate any negative impact that smaller IXCs might face. We note that the Commission already has a policy prohibiting carriers from placing restrictions on resale in their tariffs.[532] We invite comment on whether any further resale protection is necessary. Alternatively, we invite comment on whether we should permit or require incumbent LECs to retain existing per-minute or per-call local switching charges concurrently with non-traffic-sensitive charges. Finally, we invite parties to make other proposals.

d. Revision of Traffic-Sensitive PCI Formula

217. In the *LEC Price Cap Order*, the Commission concluded that it needed to adopt a formula for the common line basket PCI different from the PCI formula for the other baskets, to reflect that carrier common line rates are traffic-sensitive even though common line costs are non-traffic-sensitive.[533] Accordingly, the Commission included a "g" factor in the common line PCI formula, where g represents per-minute growth per access line.[534] The Commission found that including g would give all the benefits of demand growth to IXCs, while excluding g would give all the benefits of demand growth to LECs.[535] The Commission incorporated g/2 as a compromise, because it found that both IXCs and LECs contribute to demand growth.[536] The Commission did not attempt to measure at that time the relative contributions to demand growth made by IXCs and LECs, and expressly stated that a 50-50 split was not a precise reflection of the LECs' ability to influence usage.[537]

218. If we decide to adopt a capacity-based local switching rate structure, it may be appropriate to include a factor in the traffic-sensitive PCI formula similar to the g factor currently in the common line PCI formula. Although, as discussed above, it is possible that a capacity-based local switching rate structure reflects costs better than a per-minute rate

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[532] Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), *cited in, e.g.*, Metro Communications, Inc., v. Ameritech Mobile Communications, Inc., 12 FCC Rcd 13083, 13092 (Wireless Tel. Bur., 1996).

[533] *LEC Price Cap Order*, 5 FCC Rcd at 6793.

[534] Id. at 6794. The g factor is defined as "the ratio of minutes of use per access line during the base period, to minutes of use per access line during the previous base period, minus 1." *See* Section 61.45(c)(1) of the Commission's Rules, 47 C.F.R. § 61.45(c)(1).

[535] *LEC Price Cap Order*, 5 FCC Rcd at 6794. Setting g at zero would mean that the common line PCI is unaffected by demand growth. In this case, the LEC would keep all the increased revenue resulting from that demand growth. Alternatively, incorporating a "full g" into the common line PCI would require LECs to reduce their common line PCIs to reflect all demand growth. In this case, the IXC would receive all the benefits of demand growth in the form of lower common line rates.

[536] *Id.* at 6795.

[537] *Id.*

structure, capacity-based rates may not reflect local switching costs perfectly. More specifically, an increase in the number of trunks at a switch may not lead to a proportional increase in local switching costs. Rather, such an increase in trunks may lead to a measurable increase in local switching costs only when the increase of peak demand is so great as to require an expansion of switch capacity. If this is the case, then local switching costs may not vary directly with changes in per-trunk demand. We tentatively conclude that it would not be reasonable to permit incumbent LECs to retain all the benefits of trunk growth if they are not exclusively responsible for encouraging that growth. Accordingly, we invite parties to discuss whether the traffic-sensitive PCI formula should include a "q" factor, similar to the "g" factor in the common line PCI formula, to incorporate growth in number of trunks into the traffic-sensitive PCI formula. We also invite comment on whether to adopt a q factor if we decide not to revise the local switching rate structure as proposed above, or if we permit or require LECs to offer both usage-sensitive and capacity-based local switching rates.

219. We also request comment on the definition of this q factor if we decide to adopt it. For example, should it be based on the change in DS-1 equivalent capacity? Should price cap LECs measure changes in DS-3 equivalent capacity on some basis other than DS-1 equivalents? We intend to base any q factor we adopt on data that price cap LECs currently collect, or data that price cap LECs could collect at little or no additional cost. We therefore invite any party proposing a q factor definition to discuss whether and to what extent its definition would affect price cap LECs' data collection costs.

220. We also invite comment on the relationship between any q factor we add to the traffic-sensitive PCI formula and the g factor in the common line PCI formula. Specifically, the common line PCI formula currently includes "g/2", because the Commission found in the *LEC Price Cap Order* that both LECs and IXCs contribute to demand growth, and that "g/2" gives both IXCs and LECs a reasonable share of the benefits of per-minute demand growth.[538] We note that we invite comment below on increasing the g factor in the common line PCI formula from g/2 to a full g.[539] We therefore invite comment on whether any q factor we adopt for the traffic-sensitive PCI formula should be consistent the common line g factor, as revised in this proceeding. Alternatively, we invite comment on whether we should base the q factor in the traffic-sensitive basket on a different fraction than the common line g factor, because local switching does not make up all of the traffic-sensitive basket.[540]

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[538] *Id.*

[539] *See* Section VIII.D.1, *infra.*

[540] The services other than local switching in the traffic-sensitive basket are: (1) information; (2) database access services; (3) billing name and address (BNA); (4) trunk ports; and (5) signalling transfer point port termination. *See* Section 61.42(e)(1) of the Commission's Rules, 47 C.F.R. § 61.42(e)(1). These services generate less revenue than local switching. Local switching generally makes up about 2/3 or 3/4 of the revenues associated with the traffic-sensitive basket.

e. Adjustment to Traffic-Sensitive PCIs

221. In the *LEC Price Cap Order*, the Commission concluded that failing to include a "g" factor in the common line PCI formula would not give IXCs any incentive to become more productive through encouraging demand growth.[541] In other words, failure to include "g" would have created an imbalance between the interests of IXC customers and LEC stockholders. This imbalance would have been substantially similar to the imbalance found by the Commission in the 1995 *LEC Price Cap Performance Review Order*. In that Order, the Commission found that it had previously set the X-Factor lower than it intended, due to the inclusion of 1984-85 data in one of the original X-Factor studies.[542] The Commission observed that LECs were supposed to become more efficient to earn more than would have been permitted under rate-of-return regulation, and ratepayers were to benefit from rates reduced to the level that would provide this challenge.[543] The Commission then concluded that some portion of the LECs' earnings were obtained without any productivity improvements, and rates were not as low as the Commission intended.[544]

222. If we find that local switching costs are more appropriately recovered through capacity-based charges, then permitting LECs to charge per-minute local switching rates since LEC price cap regulation was adopted in 1991, without including a q factor in the traffic-sensitive PCI formula, may have created an imbalance between the interests of IXC customers and LEC stockholders, similar to the imbalance found in the *LEC Price Cap Performance Review Order* resulting from the 1984-85 data discussed above.[545] The existing per-minute rate structure provides the incumbent LEC with more revenue whenever per-minute demand increases, regardless of whether the LEC's costs have increased. This revenue increase results in higher earnings for the LEC, regardless of whether it has become more productive in its provision of local switching. This could explain, at least in part, why overall LEC earnings have increased in recent years, even though the Commission increased the X-Factor in 1995 and 1997. Furthermore, such an imbalance would remain embedded in the incumbent LECs' traffic-sensitive PCIs, regardless of whether we correct it by revising the local switching rate structure or including a q factor in the traffic-sensitive PCI formula on a forward-looking basis. Moreover, using per-minute charges without simultaneously using a q factor may have exacerbated this imbalance. Accordingly, we seek comment on whether to require a one-time downward adjustment of the LECs' traffic-sensitive PCIs to correct for any imbalance on a

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[541] *LEC Price Cap Order*, 5 FCC Rcd at 6795.

[542] *LEC Price Cap Performance Review Order*, 10 FCC Rcd at 9069.

[543] *Id.* at 9070.

[544] *Id.*

[545] *See* AT&T *ex parte* statement of Feb. 19, 1999, at 6 (alleging a 45 percent rate of return for all price cap LECs in the traffic-sensitive basket).

going-forward basis, similar to the adjustment required in the *Price Cap Performance Review Order*.[546] Specifically, price cap LECs were required to reduce their PCIs to the levels that would have resulted had the Commission excluded the 1984 data point in its 1990 X-Factor determination. In this proceeding, we invite comment on whether price cap LECs should be required to reduce their traffic-sensitive PCIs to the levels that would have resulted had the Commission incorporated a q factor in the traffic-sensitive PCI formula that took effect in 1991. Alternatively, we invite comment on basing this PCI adjustment on a more recent year.

2. Tandem-Switched Transport

223. We solicit comment on whether we should revise the rate structure for tandem-switched transport, for the same reasons we consider revising the local switching rate structure discussed above.[547] We also invite comment on all the issues we discussed in this section above, to the extent that they are relevant to tandem switching. Is tandem-switched transport different from local switching, such that capacity-based tandem switching rates are inappropriate? If capacity-based tandem switching rates are appropriate, how would they be developed? For example, they could be established based on the number of trunks between the IXC POP and the tandem switch.

224. If the tandem switching rate structure should remain usage-based, how could we prevent larger IXCs from maintaining an inadequate number of trunks to the LEC switch, and using tandem switching as inexpensive overflow? Could LECs establish a rate for IXCs that only use tandem-switched transport, and recover a higher rate for overflow from local switching? If so, we recognize that IXCs rely exclusively on tandem switching for certain routes, and so we believe that an overflow rate should be applied only on routes for which an IXC also has trunks to the local switch.

225. In addition, we invite parties to discuss whether we should add a q factor to the trunking basket PCI, if we conclude that tandem switching costs are more appropriately recovered through capacity-based rates. If so, how should that q factor be defined? Parties may also discuss whether we should adjust the trunking basket PCI to reflect that price cap LECs have recovered essentially flat costs through traffic-sensitive rates since LEC price cap regulation took effect in 1991, similar to the traffic-sensitive PCI adjustment we propose above.

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[546] *Price Cap Performance Review Order*, 10 FCC Rcd at 9069-73. *See also Bell Atlantic v. FCC*, 79 F.3d at 1204-05 (affirming *Price Cap Performance Review Order* on this issue).

[547] *See* Section VIII.C.1.c, *supra*.

D. Price Cap Issues

1. Common Line Issues

a. G Factor

226. The Commission proposed revisions to the common line formula in the *Price Cap Fourth FNPRM*, which established part of the record for the *Price Cap Fourth Report and Order*.[548] The Commission decided against revising the common line formula in the *Price Cap Fourth Report and Order*, however, because it expected the common line PCI formula to be eliminated when per-minute CCL charges were eliminated, as a result of rules adopted in the *Access Reform First Report and Order*.[549] The transition away from per-minute CCL charges, however, is progressing slowly for certain incumbent LECs. Accordingly, we take this opportunity to review some of the common line issues addressed in the *Price Cap Fourth Report and Order*.

227. Above, we explain why the Commission included a "g/2" term in the common line formula when it adopted LEC price cap regulation.[550] Later, in 1995, the Commission found evidence that IXCs influence per-minute demand growth more than LECs, and considered increasing the g factor to reflect the IXCs' greater contribution to demand growth.[551] The Commission did not revise the common line formula at that time, however, because it found that the separate common line formula could be eliminated completely if it adopted a moving average TFP-based X-Factor. The moving average X-Factor would incorporate the effects of growth into the PCI, and a separate g factor would no longer be necessary.[552] Although the Commission did not adopt a moving average-based X-Factor in the 1997 *Price Cap Fourth Report and Order*, it nevertheless decided against revising the common line formula, because the Commission expected per-minute CCL rates and the separate common line formula to be phased out relatively quickly as a result of common line

[548] *Price Cap Fourth FNPRM*, 10 FCC Rcd at 13680-81.

[549] *Price Cap Fourth Report and Order*, 12 FCC Rcd at 16710 (citing *Access Reform First Report and Order*, 12 FCC Rcd at 16027). In the *Access Reform First Report and Order*, the Commission adopted rules to phase out per-minute CCL charges through imposition of PICCs, and to replace the current common line PCI formula with the formula used for other PCI baskets when per-minute CCL charges are eliminated. *Access Reform First Report and Order*, 12 FCC Rcd at 16027-28).

[550] Section VIII.C.1.d, *supra*.

[551] *LEC Price Cap Performance Review Order*, 10 FCC Rcd at 9078-80.

[552] *Id.* at 9079-80.

rule revisions adopted concurrently in the *Access Reform First Report and Order*.[553] Our access reform rules have not eliminated per-minute CCL charges for some companies as quickly as the Commission had anticipated. As a result, this issue warrants re-examination. We invite comment on whether the g factor in the common line PCI formula should be increased, and if so, whether it should be increased to a full "g." Increasing the "g" factor would cause the common line PCI to decrease more quickly, which in turn would cause the per-minute CCL rate to decrease more quickly. The g factor would still be eliminated when the CCL is eliminated in the access reform transition. Parties advocating a "g" factor between g/2 and g should specify what fraction of g they believe should be included in the common line PCI formula, and explain their reasons.[554]

b. Reflection of Revised Common Line Rate Structure in Common Line Formula

228. We have determined that as long as the multi-line business PICC exists, to the extent that the ratio of primary residential and single line business lines to non-primary residential and multiline business lines changes, the common line formula may create a windfall or shortfall for some LECs. Accordingly, we seek comment on revising the common line PCI rules to eliminate any such windfall or shortfall.

229. Prior to the *Access Reform First Report and Order*, price cap LECs recovered all their common line revenues through two charges: (1) flat monthly end user common line charges (EUCL), also known as SLCs, imposed on end users; and (2) per-minute CCLCs imposed on IXCs.[555] In the *Access Reform First Report and Order*, the Commission prescribed new flat common line rate elements, called PICCs, to be imposed on IXCs in most cases.[556] PICC charges were designed to recover some of the revenues formerly recovered through per-minute CCL charges, and to annually increase until the per-minute CCL charge is phased out.[557]

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[553] *Price Cap Fourth Report and Order*, 12 FCC Rcd at 16709-10; *Access Reform First Report and Order*, 12 FCC Rcd at 16027-28.

[554] The current rules require price cap LECs to replace the current common line PCI formula with the formula used for other PCI baskets when they eliminate per-minute CCL charges. *Access Reform First Report and Order*, 12 FCC Rcd at 16027-28; Section 61.45(c)(2) of the Commission's Rules, 47 C.F.R. § 61.45(c)(2). We do not contemplate revising the rules to permit or require price cap LECs to use the separate common line PCI formula after they have eliminated per-minute CCL charges.

[555] *See Access Reform First Report and Order*, 12 FCC Rcd at 16018.

[556] *Id.* at 16019-26. Incumbent LECs are permitted to impose PICC charges directly on end users that do not select a presubscribed interexchange carrier (PIC). *Id.* at 16019.

[557] *Id.* at 16023.

230. PICCs on single-line business and primary residential lines were set initially so that the sum of the PICC and SLC applicable to each of these lines was less than the average revenue per line permitted under the price cap rules.[558] Those PICCs will increase until the sum of the applicable PICC and SLC is equal to the maximum permitted revenue per line.[559] During the interim, price cap LECs are allowed to recover this shortfall through PICCs on multiline business lines. As a result, during this interim period, single-line business and primary residential lines receive an explicit subsidy from multiline business lines.[560]

231. The growth rate of the amount received through this PICC subsidy ideally should be equivalent to the growth rate of primary residential and single-line business lines. The PICC subsidy, however, will grow too quickly or too slowly whenever the lines giving subsidy, multiline business lines,[561] grow at a different rate than the lines receiving subsidy, single-line business and residential lines. This subsidy increases disproportionately if multiline business lines grow more quickly than single-line business and primary residential lines. This subsidy fails to keep up with line growth if multiline business lines grow less quickly than single-line business and primary residential lines.

232. For example, assume that the average permitted revenue per line in Year 1 is $6, and that the LEC provides 50 residential lines and 50 multiline business lines. Thus, the LEC is permitted $300 in revenue for residential lines (50*6), and $300 in multiline business lines (50*6). Assume also that the caps on SLCs and PICCs permit the LEC to collect $4 for each residential line, and $8 for each multiline business line. In this case, residential line charges recover only $200 in revenue, and so need $100 in subsidy. Multiline business lines recover $400 of revenue, and so generate $100 in subsidy. In this case, there is no windfall or shortfall in subsidy, and the LEC recovers an average of $6.00 per line. Now assume that, in Year 2, multiline business lines grow from 50 to 70, while residential lines remain at 50, and everything else in Year 1 remains the same. In this case, residential lines still require $100 in subsidy. The LEC, however, would collect $560 in revenue from each multiline business line (70*8). As a result, multiline business charges generate $160 in subsidy. Because the LEC's residential lines require only $100 in subsidy, the LEC receives a windfall of $60 in this example, and would recover an average of $6.33 per line. Thus, under our current rules,

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[558] *Id.* at 16020-21.

[559] *Id.*

[560] *Id.* at 16022. In some study areas, some or all of the non-primary residential PICC may also subsidize primary residential lines, depending, among other things, upon the relationship of the carrier common line revenues per line and the cap on the non-primary residential SLC. In addition, if PICCs on multiline business lines still do not enable a price cap LEC to recover all its permitted common line revenue, the LEC may recover those residual revenues through per-minute CCL charges assessed on originating minutes. *Id.*

[561] As discussed above, non-primary residential lines also provide subsidy in some cases, and so the growth rate of non-primary residential lines also affects this subsidy.

when calculating common line permitted revenue for the following year, the incumbent LEC would base those calculations on $6.33 per line rather than $6.00 per line.

233. If we permitted common line revenues to increase with the average growth rate of all common lines, we would eliminate the windfall or shortfall that now occurs whenever multiline business lines grow faster or slower than primary residential and single-line business lines. Accordingly, we invite comment on revising the formula in Section 61.46(d)(1) so that permitted common line revenues increase with the average growth rate of all common lines. We also invite interested parties to propose specific revisions to this formula. Finally, we solicit comment on whether any disproportionate increase or decrease in common line subsidy has created an imbalance between ratepayer and stockholder interests, of the kind we discussed at length in the *LEC Price Cap Performance Review Order*[562] and in this Section of this Order. If so, should we require price cap LECs to make exogenous adjustments to their common line PCIs to correct this imbalance on a going-forward basis?

2. Reorganization of Baskets and Bands

234. In the *Access Reform First Report and Order*, the Commission revised the local switching rate structure to require LECs to charge flat charges for dedicated trunk ports.[563] Price cap LECs established these new rate elements in tariffs that took effect on January 1, 1998. Because of the relative levels of demand for trunk ports and local switching, a price cap LEC could, in subsequent tariff filings, reduce its flat trunk port charges substantially, and make up that revenue through a relatively small increase in its per-minute local switching charge. Some price cap LECs did in fact reduce their recently-created flat trunk port charges substantially in their 1998 annual access filings, and some carriers have eliminated those charges in some study areas in their 1999 annual access filings.[564] We invite comment on whether we should modify our price cap rules to place flat charges and traffic-sensitive charges in separate baskets, to prevent LECs from eliminating their existing flat trunk port charges, and thereby circumventing the local switching rate structure rules we adopted in the *Access Reform First Report and Order*. In addition, we invite parties to propose specific services to be included in each basket, if we decide that any modifications to the basket configurations are warranted. Alternatively, we invite comment on whether adopting a capacity-based local switching rate structure would be sufficient to preclude LECs from entirely circumventing the local switching rate structure rules adopted in the *Access Reform First Report and Order*.

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[562] *LEC Price Cap Performance Review Order*, 10 FCC Rcd at 9069-70.

[563] *Access Reform First Report and Order*, 12 FCC Rcd at 16035-36.

[564] Sprint eliminated its trunk port charges in its Arizona study area, and GTE eliminated these charges in its Northern California, Montana, and Minnesota study areas.

3. Inflation Measure

235. Currently, the inflation measure in the PCI formula is the "Fixed Weight Price Index for Gross Domestic Product, 1987 Weights."[565] The Bureau of Labor Statistics (BLS) now measures inflation with a chain-weighted GDP-PI, which bases weights for the current year's index on the prior year. We also note that the Commission used chain-weighted price indices in its calculation of a new X-Factor based on total factor productivity.[566] We tentatively conclude that we should make the inflation measure in the PCI formula consistent with BLS's measure and with that used in setting the X-Factor. We seek comment on this tentative conclusion.

E. CLEC Access Charges

1. Background

236. As we discuss above,[567] the Commission requested comment in the *Access Reform NPRM* on the regulation of terminating access charges of both incumbent LECs and CLECs. The Commission noted that, with originating access, the calling party has the choice of service provider, the decision to place a call, and the ultimate obligation to pay for the call.[568] The calling party also is the customer of the IXC that purchases the originating access service.[569] The Commission noted that, unlike originating access, the choice of an access provider for terminating access is made by the recipient of the call. It suggested that, because neither the originating caller nor its long-distance service provider can exert substantial influence over the called party's choice of terminating access provider, the terminating end of a long-distance call may remain a bottleneck, controlled by the LEC providing access to a particular customer. The Commission also sought comment on the continued treatment of incumbent LEC originating "open end" minutes as terminating minutes for access charge purposes, and whether to extend that approach to CLECs.[570] The Commission noted that, in

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[565] Section 61.3(q) of the Commission's Rules, 47 C.F.R. § 61.3(q).

[566] *See, e.g., Price Cap Fourth Report and Order*, 12 FCC Rcd at 16784 (App. D).

[567] *See* Section VII.A, *supra.*

[568] *Access Reform NPRM*, 11 FCC Rcd at 21472.

[569] *Id.*

[570] *See id.* at 21477. "The term open end of a call describes the origination or termination portion of a call that utilizes exchange carrier common line plant (a call can have no, one, or two open ends)." 47 C.F.R. § 69.105(b)(1)(ii).

some cases, such as 800 and 888 service, the called party, which pays for the call, is unable to influence the calling party's choice of provider for originating access services.[571]

237. Based on the record submitted in response to the *Access Reform NPRM*, the Commission concluded that non-incumbent LECs should be treated as non-dominant in the provision of terminating access.[572] The Commission found that there was insufficient evidence in the record to determine that CLECs had the ability to exercise market power in the provision of terminating access.[573] The Commission further concluded that, as CLECs attempt to expand their market presence, the rates of incumbent LECs or other potential competitors would constrain the CLECs' terminating access rates.[574] The Commission decided, therefore, not to adopt any regulations at that time governing the provision of terminating access provided by CLECs because CLECs did not appear to possess market power.[575] The Commission indicated, however, that it would revisit the issue if there were sufficient indications that CLECs were imposing unreasonable terminating access charges.[576] Although the Commission did not address the issue of CLEC originating access, it indicated, in the context of incumbent LEC originating access, that it believed that new entrants would eventually exert downward pressure on originating access rates.[577] The Commission also concluded that the continued treatment of "open end" originating minutes, such as those for 800 or 888 services, as terminating minutes for access charge purposes was appropriate because the called party, which pays for the 800 or 888 calls, has limited ability to influence the calling party's choice of access provider.[578]

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[571] *See id.*

[572] *See Access Reform First Report and Order*, 12 FCC Rcd at 16140; *see also* Section VII.A, *supra* for a definition of non-dominant carrier and a detailed discussion of the Commission's conclusions.

[573] *See Access Reform First Report and Order*, 12 FCC Rcd at 16140; *see also* Section VII.A. supra.

[574] *See Access Reform First Report and Order*, 12 FCC Rcd at 16140; *see also* Section VII.A. *supra.*

[575] *See Access Reform First Report and Order*, 12 FCC Rcd at 16141-42; *see also* Section VII.A, *supra.*

[576] *See Access Reform First Report and Order*, 12 FCC Rcd at 16140 (noting that CLEC terminating access rates exceeding originating rates in the same market may suggest the need to revisit the regulatory approach; similarly, CLEC rates that exceed incumbent LEC terminating rates in the same market may suggest that a CLEC's terminating access rates are excessive).

[577] The Commission concluded that new entrants, by purchasing unbundled network elements or providing facilities-based competition, eventually will exert downward pressure on incumbent LEC originating access rates. *Id.* at 16135-36.

[578] *Id.* at 16140. The Commission noted that incumbent LEC access charges for "open end" minutes would be governed by the same requirements applicable to terminating access provided by incumbent LECs. *Id.* at 16142. In order to address the potential that incumbent LECs might charge unreasonable rates for terminating access, the Commission limited the price cap incumbent LEC recovery of TIC and common costs from

238. Since that time, however, we have received indications that the Commission may have overestimated the ability of the marketplace to constrain CLEC access rates. In particular, IXCs allege that a substantial number of CLECs impose switched access charges that are significantly higher than those charged by the incumbent LECs with which they compete,[579] suggesting that the Commission may need to revisit the issue of CLEC access rates. If market forces fail to constrain CLEC access rates, requiring IXCs to pay access charges set unilaterally by CLECs is not economically efficient and does not further the goals of the Telecommunications Act of 1996. We are reluctant, however, to regulate rates charged by competitive entrants to the local exchange and exchange access markets and prefer instead to seek a marketplace solution that might constrain CLEC access rates.

2. Discussion

239. Throughout the *Access Reform* proceeding, the Commission has questioned whether CLECs possess market power over terminating access service and whether such power precludes market forces from ensuring that terminating access charges are just and reasonable. In the *Access Reform NPRM*, the Commission invited parties to comment on whether CLECs have market power over IXCs that need to terminate long-distance calls to CLEC customers, and, if so, whether the Commission should subject CLEC terminating access rates to some form of regulation.[580] Given the rapidly evolving telecommunications industry, we again invite parties to comment on this issue.

240. In particular, in response to the *Access Reform NPRM*, USTA challenges the fundamental premise that, because the called party is not paying for the call, terminating access charges are shielded from downward market pressures.[581] According to USTA, if a LEC overprices terminating access relative to originating access, a pair of callers in repeated communications would have an incentive to alter their pattern of calls to favor the lower-priced alternative.[582] In the *Access Reform First Report and Order*, the Commission

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terminating access rates for a limited period with the eventual elimination of any recovery of common line and TIC costs through terminating access charges. *Id.*

[579] *AT&T Declaratory Ruling Petition*, Appendix A (alleging that a number of CLECs impose charges that are in some cases more than twenty times higher than those charged by incumbent LECs with which they compete); see also Sprint Reply at 3; Cable & Wireless Comments at 2. Unless otherwise indicated, all citations to comments and replies in this section of the Notice refer to comments and replies submitted in response to the *AT&T Declaratory Ruling Petition.*

[580] *See Access Reform NPRM*, 11 FCC Rcd at 21476.

[581] USTA *Access Reform NPRM* Comments, Attachment 3 at 12.

[582] *Id.*; *see also* TCI Access Reform NPRM Reply at 32 (the Commission's analysis of a calling party's incentives does not consider the incentives that called parties have because of the value they place on receiving calls as well as originating them).